

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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George Apostolakis  
William D. Magwood, IV  
William C. Ostendorff

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In the Matter of )

Honeywell International, Inc. )

(Metropolis Works Uranium Conversion Facility) )

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) Docket No. 40-3392-MLA  
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**CLI-13-01**

**MEMORANDUM AND ORDER**

This proceeding stems from a request for hearing filed by Honeywell International, Inc. (Honeywell) in response to the NRC Staff's denial of Honeywell's request for an exemption from our decommissioning financial assurance requirements for its Metropolis Works uranium conversion facility (Metropolis facility).<sup>1</sup> The Staff issued its denial in 2011, after the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) remanded an earlier Staff decision that had denied the same exemption request.<sup>2</sup> Honeywell was granted a hearing by the Licensing Board and challenged the Staff's 2011 decision denying Honeywell's request for an exemption and license amendment authorizing use of an alternate method—"self-funding" or "self-guarantee"—to demonstrate decommissioning funding assurance for the Metropolis

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<sup>1</sup> *Request for Hearing on Denial of Decommissioning License Amendment Request* (June 22, 2011) (Request for Hearing).

<sup>2</sup> *Honeywell v. NRC*, 628 F.3d 568 (D.C. Cir. 2010) (*Honeywell*).

facility. In LBP-12-6, the Board denied Honeywell's request for an exemption.<sup>3</sup> Honeywell has petitioned for review of that decision.<sup>4</sup>

We take review of LBP-12-6 and affirm the Board's decision to deny the requested exemption. Honeywell fails to show clear error in the Board's findings of fact, and fails to show legal error in the Board's decision to restrict its inquiry to facts available to the Staff at the time it issued its denial of the exemption. We also agree with the Board that Honeywell failed to satisfy the requirements for an exemption under 10 C.F.R. § 40.14.

#### I. REGULATORY STANDARDS REGARDING DECOMMISSIONING FINANCIAL ASSURANCE AND EXEMPTIONS

With limited exceptions, section 40.36 of our regulations requires source material licensees to demonstrate that they can pay for the decommissioning of their regulated facilities.<sup>5</sup> Generally, a non-government licensee such as Honeywell must demonstrate such financial assurance by using one of three methods—(1) prepayment, (2) use of a surety method, insurance or *other guarantee method*, or (3) use of an external sinking fund.<sup>6</sup> As a form of “other guarantee method,” section 40.36(e)(2) permits bond-issuing licensees such as Honeywell to provide a self-guarantee of funds for decommissioning costs based on a financial test set forth in Appendix C of Part 30.<sup>7</sup> In the period relevant here, Appendix C provides that, to qualify for the alternative method of self-funding, a licensee must have, among other things, a

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<sup>3</sup> 75 NRC \_\_ (Feb. 29, 2012) (slip op.).

<sup>4</sup> See *Honeywell's Petition for Review of LBP-12-06* (Mar. 22, 2012) (Petition for Review); *Honeywell's Reply Brief in Support of Petition for Review of LBP-12-06* (Apr. 11, 2012) (Honeywell Reply).

<sup>5</sup> 10 C.F.R. § 40.36.

<sup>6</sup> *Id.* § 40.36(e)(1)-(3) (emphasis added).

<sup>7</sup> *Id.* § 40.36(e)(2).

bond rating of “A” or better, as issued by Standard and Poor’s or Moody’s<sup>8</sup> and tangible net worth at least ten times the total current decommissioning cost estimate (a 10:1 ratio requirement).<sup>9</sup>

This financial test is designed to assure that adequate funds are available to decommission licensed source materials facilities when operations cease. Like other licensees, Honeywell will be required to submit a decommissioning plan in accordance with 10 C.F.R. § 40.42 when it decides to cease NRC-licensed activities at its Metropolis facility. The objective of decommissioning is to remove a facility or site safely from service, and to reduce residual radioactivity to a level that permits either release of the property for unrestricted use or release under restricted conditions,<sup>10</sup> followed by termination of the NRC license.

To meet this objective, we require source materials licensees like Honeywell to submit a Decommissioning Funding Plan far in advance of submitting the actual plans for decommissioning.<sup>11</sup> This Plan must include a periodically-adjusted cost estimate and specify the method for assuring that sufficient funds will be available when needed. The licensee also must certify that the amount assured for decommissioning meets or exceeds estimated decommissioning costs.<sup>12</sup>

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<sup>8</sup> *Id.* pt. 30, app. C, § II.A.3.

<sup>9</sup> *Id.* pt. 30, app. C, § II.A.1.

<sup>10</sup> “Unrestricted use” means that, “from a radiological standpoint, no hazards exist at the site, the license can be terminated, and the site can be considered an unrestricted area.” Final Rule, General Requirements for Decommissioning Nuclear Facilities, 53 Fed. Reg. 24,018, 24,020 (June 27, 1988). In practical terms, “the objective of decommissioning is to reduce residual radioactivity in structures, soils, groundwater, and other media at the site so that the concentration of each radionuclide that could contribute to residual radioactivity is indistinguishable from the background radiation concentration for that nuclide.” Final Rule, Radiological Criteria for License Termination, 62 Fed. Reg. 39,058, 39,059 (July 21, 1997). See generally 10 C.F.R. §§ 20.1402, 20.1403(a).

<sup>11</sup> See 10 C.F.R. § 40.36(a), (d)-(e).

<sup>12</sup> See *id.* § 40.36(d).

These requirements evolved from a rulemaking proceeding that began in 1978, when we set out to review our requirements for decommissioning licensed facilities.<sup>13</sup> We were concerned that the then-current “regulatory requirements and guidance [we]re not specific enough in many critical areas,” including financial assurance of funds necessary to complete facility decommissioning.<sup>14</sup> Following lengthy technical and environmental studies, we instituted a rulemaking on the technical and financial criteria for decommissioning licensed facilities.<sup>15</sup> An integral part of the final rule was the financial test of Part 30, Appendix A (parent companies), Appendix C (bond-issuing companies) and Appendix D (companies without rated bonds)—all of which were adopted to assure that licensees would be financially capable of completing decommissioning.<sup>16</sup> We noted at the time that, given “the number and complexity of facilities that will require decommissioning . . . in the near future,” inadequate attention to decommissioning financial assurance “could result in significant adverse health, safety and environmental impacts.”<sup>17</sup>

In that rulemaking, we considered a suggestion that NRC adopt a “case-by-case” financial test rather than generic rules.<sup>18</sup> But we rejected the suggested *ad hoc* approach “because of the potential for changing licensee financial conditions and the fairly lengthy time

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<sup>13</sup> Advance Notice of Proposed Rulemaking, Decommissioning Criteria for Nuclear Facilities, 43 Fed. Reg. 10,370 (Mar. 13, 1978).

<sup>14</sup> Notice of Availability of Draft Generic Environmental Impact Statement, Decommissioning Criteria for Nuclear Facilities, 46 Fed. Reg. 11,666, 11,667 (Feb. 10, 1981).

<sup>15</sup> See Proposed Rule, Decommissioning Criteria for Nuclear Facilities, 50 Fed. Reg. 5600 (Feb. 11, 1985).

<sup>16</sup> See *generally* Final Rule, General Requirements for Decommissioning Nuclear Facilities, 53 Fed. Reg. 24,018, 24,037-38 (June 27, 1988).

<sup>17</sup> *Id.* at 24,019. See also *id.* at 24,033 (“adequate funds [must be] available so that decommissioning can be carried out in a safe and timely manner and that lack of funds does not result in delays that may cause potential health and safety problems”).

<sup>18</sup> See *id.* at 24,035.

period involved before decommissioning would take place,” plus concerns over “additional staff time [that] could be necessary to monitor the financial status of a number of licensees.”<sup>19</sup>

The self-guarantee funding mechanism used by Honeywell was adopted in 1993 “to reduce the licensee's cost burden” in fees for letters of credit, surety bonds, and other forms of third-party financial assurance, but “without causing adverse effects on public health and safety.”<sup>20</sup> We noted that the tangible net worth requirement would nonetheless be an “important factor” in the requirements for self-guarantee.<sup>21</sup> Thus, while dropping a much higher net worth requirement originally proposed, we did adopt a requirement that licensees have a tangible net worth at least ten times the decommissioning costs to qualify for self-guarantee.<sup>22</sup> Our approach under this new self-guarantee provision was deliberately conservative:

This is the first instance in which self-guarantee is being allowed under the Commission's decommissioning regulations. The Commission prefers that the more conservative criteria be used. At some future time, when the Commission has gained some experience with self-guarantee, it may consider an appropriate revision of the financial criteria.<sup>23</sup>

This prudent approach likewise marked our decommissioning rulemaking in 2008, where we sought to “reduce the likelihood that any current operating facility will become a legacy site,” defined as “a facility that is in decommissioning status with complex issues and an owner who cannot complete the decommissioning work for technical or financial reasons.”<sup>24</sup> To achieve this goal, we sought to “reduce the number of funding shortfalls caused in the past by:

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<sup>19</sup> *Id.*

<sup>20</sup> Final Rule, Self-Guarantee as an Additional Financial Assurance Mechanism, 58 Fed. Reg. 68,726, 68,726 (Dec. 29, 1993).

<sup>21</sup> *Id.* at 68,728.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Ex. NRC000014, Proposed Rule, Decommissioning Planning, 73 Fed. Reg. 3812, 3812-13 (Jan. 22, 2008) (Proposed Rule, Decommissioning Planning).

(1) Overly optimistic decommissioning assumptions; (2) Lack of adequate updating of cost estimates during operation; and (3) Licensees falling into financial distress with financial assurance funds unavailable for decommissioning.”<sup>25</sup>

In our 2008 proposed rule, we also considered loosening the self-guarantee requirements to allow a licensee’s *intangible* assets to meet some financial tests requiring *tangible* assets. The NRC regulations that were in effect in 2008 and remain in effect today allow self-guarantee for financial assurance by licensees that meet the generic financial test prescribed in Appendices A, C, and D of 10 C.F.R. Part 30, as applicable.

After carefully considering the matter, we recently promulgated a new rule that revised those Appendices to permit licensees to include *intangible* assets in their proposed “net worth” calculations, based on our conclusion that this change would not unduly risk a shortfall in decommissioning funds.<sup>26</sup> Our new rule, which went into effect late last year, reflects this new feature. The financial test in section II.A.1 of Appendices A, C and D of Part 30 “allow[s] the use of intangible assets . . . to meet specified criteria in the financial tests for . . . self-guarantees.”<sup>27</sup>

This new provision will be balanced by a new *minimum* tangible net worth requirement for the self-guarantee financial test applicable to bond-issuing companies like Honeywell. The financial tests in 10 C.F.R. Part 30, Appendix A (parent companies), Appendix C (bond-issuing companies) and Appendix D (companies without rated bonds) impose different tangible net worth requirements. The new rule will impose a *minimum* tangible net worth requirement for all self-guaranteeing licensees, using a cost-adjustment feature to reflect inflation. For licensees

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<sup>25</sup> *Id.* at 3822.

<sup>26</sup> Ex. NRC000015, Final Rule, Decommissioning Planning, 76 Fed. Reg. 35,512, 35,524 (June 17, 2011) (Final Rule, Decommissioning Planning).

<sup>27</sup> *Id.*

covered by Part 30, Appendix C, the adjusted cost at the time of the rule's adoption will be \$21 million.<sup>28</sup>

Having explained the parameters of our financial assurance program for materials licensees, we now turn to NRC's exemption provisions for self-guaranteeing licensees like Honeywell. A licensee can seek an exemption from the decommissioning financial assurance requirements pursuant to section 40.14(a) of our regulations.<sup>29</sup> That section provides that "[t]he Commission may . . . grant such exemptions from the requirements of the regulation[s] in this part as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest."<sup>30</sup> Although our regulations thus authorize exemptions, we consider an exemption to be an "extraordinary" equitable remedy<sup>31</sup> to be used only "sparingly."<sup>32</sup>

The reason for this high standard is simple. Every NRC regulation has gone through the rulemaking process, including public notice-and-comment, and its underlying rationale has been explained in our Statements of Consideration. Although our authority under the Atomic Energy Act of 1954, as amended (AEA), and other statutes to adopt rules of general application "entails a concomitant authority to provide exemption procedures in order to allow for special

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<sup>28</sup> See *id.* at 35,524-25.

<sup>29</sup> As noted above, the financial assurance provisions of section 40.36(e)(2) governing source materials licensees like Honeywell incorporate by reference the financial test in Appendix C to Part 30. Therefore, the exemption provisions of section 40.14 apply here.

<sup>30</sup> 10 C.F.R. § 40.14(a).

<sup>31</sup> See *U.S. Department of Energy (Clinch River Breeder Reactor Plant)*, CLI-82-23, 16 NRC 412, 426, *remanded on other grounds*, *Natural Res. Def. Council, Inc. v. NRC*, 695 F.2d 623, 625 (D.C. Cir. 1982); *Washington Public Power Supply System (WPPSS Nuclear Project Nos. 3 and 5)*, CLI-77-11, 5 NRC 719, 723 (1977).

<sup>32</sup> *Clinch River*, CLI-82-23, 16 NRC at 426; *WPPSS*, CLI-77-11, 5 NRC at 723.

circumstances,<sup>33</sup> our rules presumably apply until an exemption requester has met the high burden we place upon such requests. Our exemption regulations are in place to provide equitable relief only when supported by compelling reasons—they are not intended to serve as a vehicle for challenging the fundamental basis for the rule itself. Challenges to the rule itself are more appropriately lodged through a request for rulemaking.<sup>34</sup> To the extent such challenges are presented in an adjudication, they also contravene our rule prohibiting collateral attacks on regulations.<sup>35</sup>

An exemption standing alone does not give rise to an opportunity for hearing under our rules.<sup>36</sup> But when a licensee requests an exemption in a related license amendment application, we consider the hearing rights on the amendment application to encompass the exemption request as well.<sup>37</sup> In 2006, Honeywell requested an exemption to the financial test of

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<sup>33</sup> *U.S. v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 755 (1972). See also *Ala. Power Co. v. Costle*, 636 F.2d 323, 357 (D.C. Cir. 1979) (“[L]imited grounds for the creation of exemptions are inherent in the administrative process,” and agencies may use “equitable discretion . . . to afford case-by-case treatment taking into account circumstances peculiar to individual parties in the application of a general rule . . . or even in appropriate cases to grant dispensation from the rule’s operation.”) (internal quotation marks omitted).

<sup>34</sup> *E.g.*, *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-03-7, 58 NRC 1, 7 & n.14 (2003).

<sup>35</sup> See 10 C.F.R. § 2.335(a).

<sup>36</sup> AEA § 189a(1)(A), 42 U.S.C. § 2239(a)(1)(A) (providing for a hearing opportunity in certain specified proceedings). See, *e.g.*, *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), CLI-00-5, 51 NRC 90, 94-98 (2000) (discussing the legislative and adjudicatory background of NRC exemption hearings, and concluding that exemption requests are not entitled to a hearing under section 189a).

<sup>37</sup> See *Honeywell*, 628 F.3d at 575-76 (the court based its own jurisdictional finding on the NRC’s treatment of the exemption request as an amendment to Honeywell’s license); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 465-67 (2001) (“Because resolution of the exemption request directly affects the licensability of the proposed ISFSI, the exemption raises material questions directly connected to an agency licensing action and thus comes within the hearing rights of interested parties”); *Clinch River*, CLI-82-23, 16 NRC at 421 (“for there to be any statutory right to a hearing on the granting of an exemption, such a grant must be part of a proceeding for the granting, suspending, revoking, or (continued . . . )

Part 30, Appendix C as part of its license renewal application (which involved a license amendment); Honeywell's subsequent exemption requests sought extensions of that original request by further amendment of its license. Thus, Honeywell's amendment application entitled it to an adjudicatory hearing once the Staff denied its 2009 license amendment and exemption request.

## II. BACKGROUND<sup>38</sup>

For most of the period from 1994 until late 2006, Honeywell qualified for the self-funding "decommissioning funding assurance" option under Appendix C.<sup>39</sup> But in November 2006, Honeywell notified the NRC that it no longer satisfied the financial test for self-funding.<sup>40</sup> Specifically, Honeywell explained that its tangible net worth had declined to \$1.929 billion, to the point where it no longer satisfied the 10:1 ratio requirement.<sup>41</sup> On December 1, 2006, Honeywell filed the first of three applications under 10 C.F.R. § 40.14, seeking permission to include in its 10:1 ratio calculation the intangible asset of "goodwill."<sup>42</sup>

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amending of any license or construction permit under the Atomic Energy Act") (addressing 10 C.F.R. § 50.12).

<sup>38</sup> We provide a detailed background discussion in light of the case's complex and multi-layered procedural history.

<sup>39</sup> See LBP-12-6, 75 NRC at \_\_\_ (slip op. at 4). In 2002, Honeywell "briefly fell out of compliance with the 10:1 tangible net worth requirement." *Id.* As the Board noted, Honeywell obtained a temporary exemption and returned to compliance in mid-2003. *Id.* at \_\_\_ (slip op. at 5).

<sup>40</sup> See Ex. HNY000004, Honeywell Metropolis Works (Docket No. 40-3392)—Request for Exemption from Decommissioning Financial Assurance Requirements (Dec. 1, 2006) (2006 Exemption Request).

<sup>41</sup> See *id.* at 5; Ex. NRC000006, Neuman, Jeffrey, Honeywell Fluorine Products, letter to Document Control Desk, U.S. Nuclear Regulatory Commission (Nov. 3, 2006), "Exhibit A: Honeywell Historical Financial Assurance Data."

<sup>42</sup> See Supplemental Information: Honeywell Metropolis Works Request For Extension Of Exemption From Decommissioning Financial Assurance Requirements (undated), at 5 (goodwill represents "the future economic benefits arising from other assets acquired in a business combination that are not individually identified and separately recognized"), appended to Ex. HNY000008, Cope, David, Honeywell, letter to Document Control Desk, U.S. Nuclear Regulatory Commission, Supplemental Information to Honeywell Metropolis Works Request for (continued . . . )

In that first exemption request, Honeywell acknowledged that licensees traditionally have not been permitted to include goodwill in the calculation of their tangible net worth for purposes of Part 30, Appendix C.<sup>43</sup> Honeywell argued, however, that “allowance for goodwill would provide an equivalent level of assurance.”<sup>44</sup> According to Honeywell, a strict application of the NRC’s “tangible net worth” test would inaccurately reflect Honeywell’s “financial strength, stability and low risk of default.”<sup>45</sup> To justify this conclusion, Honeywell sought to distinguish its diversified financial portfolio from the less-diversified portfolios of NRC-regulated electric utilities and mining companies that rely on a relatively narrow category of tangible assets to generate cash.<sup>46</sup> By contrast, Honeywell claimed that, as a multi-industry conglomerate, it can rely on a wide variety of revenue streams.<sup>47</sup> Honeywell pointed out that, from 2002 to 2006, it had generated approximately \$3 billion in goodwill through acquisitions of other companies.<sup>48</sup> Further, Honeywell observed that it had maintained “an ‘A’ rating from both Moody’s and

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Extension of Exemption from Decommissioning Financial Assurance Requirements (Oct. 13, 2009) (2009 Supplemental Information); Ex. NRC000023, “Generally Accepted Accounting Principles Guide” (undated), § 23.04 (non-public) (GAAPG) (ML11349A253). See also Request for Hearing at 3 n.2:

In almost all business combinations, the consideration paid by the acquiring company exceeds the book value of the assets acquired and liabilities assumed from the target. The reason for this excess of goodwill is that the acquired company is valued on the basis of its cash flow or net income generating potential, not on the simple book value of its assets and liabilities. Thus, in the case of an acquisitive company like Honeywell, goodwill may make up a considerable portion of its assets. This is in contrast to “tangible assets,” which include, for example, a company’s buildings, factories, and machinery.

<sup>43</sup> Ex. HNY000004, 2006 Exemption Request, at 1.

<sup>44</sup> *Id.* at 3.

<sup>45</sup> *Id.* at 1.

<sup>46</sup> See *id.* at 4.

<sup>47</sup> See *id.* at 4. See also *id.* at 1, 3 (regarding cash flow).

<sup>48</sup> See *id.* at 4.

Standard & Poor's since 1992,"<sup>49</sup> and had generated \$2.2 billion in free cash flow from 2002 to 2006.<sup>50</sup> Honeywell also maintained that a "rigid application of the tangible net worth test would require Honeywell to divert substantial financial resources to obtain a letter of credit or some other third party credit support," but would benefit neither operational safety nor public safety nor the common defense and security.<sup>51</sup>

In 2007, the Staff granted Honeywell's exemption request. In the accompanying Technical Evaluation Report (TER), the Staff explained that the purpose of the NRC's decommissioning financial assurance requirement is to assure that the licensee's funds for decommissioning are available whenever they are needed—both under normal circumstances and in times of financial distress.<sup>52</sup>

The Staff also explained that, when evaluating a licensee's ability to pay under conditions of financial distress, the Staff considers the licensee's bond rating and the ratio of assets to decommissioning liability.<sup>53</sup> The Staff recognized that Honeywell's tangible net worth was insufficient to enable Honeywell to meet the 10:1 ratio, but found that the inclusion of goodwill would raise the ratio to a level exceeding 10:1.<sup>54</sup> The Staff concluded that Honeywell's

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<sup>49</sup> *Id.* at 1, 2.

<sup>50</sup> *Id.* at 3 & n.2.

<sup>51</sup> *Id.* at 1. *See also id.* at 5-6.

<sup>52</sup> *See* Ex. HNY000009, Technical Evaluation Report for the Renewal of Source Materials License SUB-526 for Honeywell Metropolis Works UF<sub>6</sub> Conversion Plant[,] Metropolis, Illinois, Docket 40-3392, at 51-55 (May 11, 2007) (containing only those five pages of the TER). *See also* Janosko, Gary S., U.S. Nuclear Regulatory Commission, letter to David Edwards, Honeywell, "Renewal of Honeywell Metropolis Works Source Materials License No. SUB-526" (May 11, 2007), at 1 (ML062140705) (explaining that the review of Honeywell's exemption request "is documented in Section 11.4 of the TER, and a time limited exemption was granted as reflected in License Condition 27"). The entire TER is appended to Mr. Janosko's letter as Enclosure 1 (ML062640369).

<sup>53</sup> Ex. HNY000009, TER, at 53.

<sup>54</sup> *Id.* at 51.

tangible and goodwill assets were, together, sufficient to assure decommissioning funds in times of financial distress.<sup>55</sup>

The Staff therefore granted the requested exemption.<sup>56</sup> Accordingly, the Staff issued License Condition 27 authorizing Honeywell to include goodwill assets when determining whether it satisfied the 10:1 ratio test.<sup>57</sup> Our regulations require a self-guaranteeing licensee to pass the financial test annually.<sup>58</sup> The Staff therefore included in License Condition 27 a one-year limit to the term of the exemption, to allow the Staff to “reassess Honeywell’s financial situation.”<sup>59</sup> Also, the NRC concurrently was considering whether to initiate a notice of proposed rulemaking on decommissioning financial assurance. At that time, the Staff was considering, among other things, whether to promulgate a regulation allowing the value of goodwill to be included in Part 30, Appendix C’s financial test.<sup>60</sup>

In January 2008, we published the proposed rule.<sup>61</sup> There, we proposed to amend Appendix C of Part 30 to include the value of goodwill when calculating net worth and

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<sup>55</sup> *Id.* at 53.

<sup>56</sup> *Id.* at 54, 55.

<sup>57</sup> *Id.* at 55. See also Ex. HNY000010, Extension of One-Year Exemption from the Requirements of 10 CFR 30, Appendix C, regarding Decommissioning Financial Assurance (TAC No. L32432), at 4 (undated) (2008 Grant of Extension), appended as Enclosure 1 to Dorman, Daniel H., U.S. Nuclear Regulatory Commission, letter to Mitch Tillman, Honeywell (Aug. 22, 2008), at 1.

<sup>58</sup> 10 C.F.R. pt. 30, app. C, § II.B.3.

<sup>59</sup> Ex. HNY000009, TER, at 55.

<sup>60</sup> See generally *id.* at 53-54. Were such a rule to be proposed and adopted, it would require considering the value of goodwill in any exemption request. Accordingly, Honeywell argued that promulgation of such a regulatory provision would render Honeywell’s license amendment unnecessary. Request for Hearing at 5.

<sup>61</sup> See generally Ex. NRC000014, Proposed Rule, Decommissioning Planning.

performing the 10:1 financial test.<sup>62</sup> However, we also proposed to require tangible net worth of at least \$19 million for licensees seeking to invoke the 10:1 financial test.<sup>63</sup>

Honeywell sought, on April 11, 2008, to extend its exemption,<sup>64</sup> which was otherwise scheduled to expire on May 11, 2008.<sup>65</sup> On August 22, 2008, the Staff extended the exemption until either May 11, 2009 or the effective date of a final decommissioning planning rule.<sup>66</sup> The Staff concluded that the basis for the original exemption still applied.<sup>67</sup> The Staff noted at the time that Honeywell had retained its A-level bond rating and that its net-worth-to-decommissioning-cost ratio would be 21:1 if goodwill were included.<sup>68</sup>

As the second one-year exemption neared expiration, Honeywell filed its third and current exemption request by letter dated April 1, 2009, as supplemented on October 13, 2009—seeking a further extension until the earlier of May 11, 2010, or the effective date of the

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<sup>62</sup> *Id.* at 3831.

<sup>63</sup> *Id.* at 3825, 3831. The subsequent final rule, which became effective December 17, 2012, permits—for the first time—the use of intangible assets, including goodwill, to satisfy the 10:1 ratio requirement in Appendix C. The final rule retains the current bond-rating requirement and imposes a new requirement that a licensee's minimum tangible net worth total at least \$21 million. Ex. NRC000015, Final Rule, Decommissioning Planning, 76 Fed. Reg. at 35,524-25.

<sup>64</sup> Ex. HNY000005, Honeywell Metropolis Works (Docket No. 40-3392)—Request for Extension of Exemption from Decommissioning Financial Assurance Requirements Contained in License Condition 27 in SUB-526, Issued on May 11, 2007 (Apr. 11, 2008), as supplemented, Ex. HNY000007, Honeywell Metropolis Works—Request for Extension of Exemption from Decommissioning Financial Assurance Requirements (May 15, 2008).

<sup>65</sup> Ex. HNY000010, 2008 Grant of Extension, at 2.

<sup>66</sup> *Id.* at 4.

<sup>67</sup> *Id.* at 2.

<sup>68</sup> *Id.* at 2. However, Honeywell's tangible net worth had declined further, to negative \$1.451 billion as of December 31, 2007. Ex. HNY000011, Denial of Exemption Request from 10 CFR Part 30, Appendix C, Regarding Decommissioning Financial Assurance Requirements, Honeywell Metropolis Works, Material License No. SUB-526 (TAC NO. L32718) (Dec. 11, 2009), at 2 (Exemption Denial).

final decommissioning planning rule.<sup>69</sup> Honeywell argued that its third request was essentially the same as the second request, which the Staff had granted, and further that the request was fully compatible with the proposed rule.<sup>70</sup>

This time, however, the Staff denied Honeywell's request.<sup>71</sup> According to the Staff, Honeywell's tangible net worth in 2009 had declined significantly when compared with similar figures in 2007 and 2008.<sup>72</sup> The Staff relied specifically on the fact that Honeywell's tangible net worth had declined by a further \$3.814 billion since the Staff granted the 2008 exemption request, resulting in a negative tangible net worth of \$5.265 billion.<sup>73</sup> The Staff concluded that this further drop in tangible net worth rendered Honeywell unable to satisfy the financial test in Appendix C, and the Staff disagreed with Honeywell's assertion that "the exemption is entirely consistent with [the 2008] proposed rule."<sup>74</sup> The Staff calculated that Honeywell's ratio of tangible net worth to decommissioning costs was a negative 34:1. The Staff further calculated that Honeywell would have needed to use significantly more goodwill—\$6.8 billion in 2009, compared to \$3.7 billion in 2008—to pass the 10:1 financial test.<sup>75</sup>

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<sup>69</sup> Ex. HNY000006, Honeywell Metropolis Works (Docket No. 40-3392)—Request for Extension of Exemption from Decommissioning Financial Assurance Requirements Contained in License Condition 27 in SUB-526, Issued on May 11, 2007 (Apr. 1, 2009), at 1-2 (2009 Exemption Request), as supplemented, Ex. HNY000008, 2009 Supplemental Information.

<sup>70</sup> Ex. HNY000006, 2009 Extension Request, at 2.

<sup>71</sup> Ex. HNY000011, Exemption Denial.

<sup>72</sup> *Id.* at 2.

<sup>73</sup> *Id.* at 2, 3.

<sup>74</sup> *Id.* at 2 (quoting, without attribution, Ex. HNY000006, 2009 Extension Request, at 2). Honeywell, not the Staff, first raised the issue of the relevance of the proposed rule to the exemption request. See Ex. HNY000006, 2009 Exemption Request, at 2.

<sup>75</sup> Ex. NRC000001, NRC Staff's Testimony Regarding Honeywell's 2009 Exemption Request (Oct. 14, 2011), at 15 (A.33) (Przygodzki) (NRC Direct Testimony). See also Ex. NRC000021, Tangible Net Worth Shortfall to Meet 10-to-1 Test of 10 CFR 30, Appendix C (undated).

Honeywell appealed the Staff's decision directly to the D.C. Circuit, which vacated the agency's decision and remanded the case to the NRC. The court ruled on the dual grounds that the NRC's decision denying the exemption was inconsistent with the agency's precedent of granting Honeywell's prior exemption requests, and that the Staff had not explained adequately its reasons for the 2009 denial of Honeywell's exemption request.<sup>76</sup> First, the court found that on the record before it, a decline in Honeywell's tangible net worth did not necessarily support the Staff's 2009 decision because Honeywell's tangible net worth had been declining when the Staff granted the 2007 and 2008 exemptions.<sup>77</sup> Similarly, the court found that Honeywell's negative tangible net worth in 2009 provided an inadequate basis for the Staff's denial because Honeywell's 2008 tangible net worth was also negative.<sup>78</sup> Further, the court rejected as irrelevant the Staff's reliance on the fact that "the proposed rule would require a licensee to have \$19 million in tangible net worth before allowing consideration of goodwill." The court reasoned that the proposed rule was published before the second exemption was granted in 2008, and the governing regulations had remained unchanged since Honeywell received its exemption in 2007.<sup>79</sup>

In April 2011, following the remand, the Staff again denied Honeywell's third exemption request.<sup>80</sup> The Staff found that numerous factors, some specific to Honeywell and others

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<sup>76</sup> *Honeywell*, 628 F.3d at 579-81.

<sup>77</sup> *Id.* at 581.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Ex. HNY000012, "Staff Evaluation for Denial of Exemption Request from Title 10 of the *Code of Federal Regulations* Part 30, Appendix C, Regarding Decommissioning Financial Assurance Requirements," appended to Kinneman, John D., U.S. Nuclear Regulatory Commission, letter to Larry Smith, Honeywell, "Response to Court Remand on Denial of Exemption Request from Title 10 of the *Code of Federal Regulations* Part 30, Appendix C, regarding Decommissioning Financial Assurance Requirements, Honeywell Metropolis Works" (Apr. 25, 2011) (Kinneman Letter).

broader in scope, weighed against granting the exemption.<sup>81</sup> The Staff relied (as before) on the fact that Honeywell's tangible net worth had declined significantly from 2007 to the end of 2008.<sup>82</sup> Consequently, according to the Staff, "Honeywell would have needed to rely on significantly more intangible assets in order to meet the 10-to-1 test in Section II of Appendix C."<sup>83</sup> Those assets, concluded the Staff, were "relatively illiquid."<sup>84</sup> The Staff also found significant the fact that 2009 was the third consecutive year in which Honeywell had sought the same exemption—increasing the Staff's concern that the circumstances underlying Honeywell's exemption requests were no longer "temporary."<sup>85</sup>

The Staff further concluded that, because of the weakening economy during 2008 and 2009, the public interest was better served by more narrowly granting exemptions from Appendix C.<sup>86</sup> Specifically, the Staff expressed a concern about the global economy's sharp downward turn in late 2008 and the high level of uncertainty associated with future business conditions in 2009.<sup>87</sup> Further, the Staff was unwilling to continue its past reliance upon Honeywell's bond rating because, by 2009, the ongoing financial crisis had raised doubts as to the reliability of bond ratings generally.<sup>88</sup> The Staff recognized that an increasing number of U.S. companies were taking "goodwill impairment" charges, and that the amount of these

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 3-7.

<sup>83</sup> *NRC Staff's Opposition to Hearing Request* (July 15, 2011), at 5. See also Transcript (Tr.) at 25 (Clark), 120 (Clark) (Dec. 15, 2011, Evidentiary Hearing).

<sup>84</sup> Ex. NRC000001, NRC Direct Testimony, at 15 (A.34) (Przygodzki). See also *id.* at 17 (A.37) (Przygodzki, Fredrichs), 23 (A.49) (Przygodzki, Kline, Fredrichs), 30 (A.63) (Przygodzki), 31 (A.64) (Przygodzki).

<sup>85</sup> Ex. HNY000012, Kinneman Letter, at 3, 4, 7.

<sup>86</sup> *Id.* at 4-5.

<sup>87</sup> *Id.* at 4.

<sup>88</sup> *Id.* at 4-6.

charges was far higher than in previous years.<sup>89</sup> It was in this context that Honeywell had requested the Staff's permission to use both an unprecedented amount and an unprecedented percentage of its goodwill to support its exemption request.<sup>90</sup>

Honeywell challenged the Staff's April 2011 decision and requested a hearing, which the Board granted.<sup>91</sup> Following seven months of pre-hearing, hearing, and post-hearing activity, the Board denied Honeywell's exemption request in LBP-12-6.

The Board examined the facts underlying the Staff's denial of Honeywell's 2009 exemption request and found that the Staff's decision had ample factual support. As relevant here, the Board concluded that it must evaluate Honeywell's exemption request on the basis of information that was available as of 2009.<sup>92</sup> The Board examined the Staff's April 25, 2011, decision using the *de novo* standard of review.<sup>93</sup> The Board then reached two alternative conclusions of law—each of which independently supported its affirmance of the Staff's decision to deny Honeywell's exemption request.

Looking to 10 C.F.R. § 50.12, the Board concluded that Honeywell's exemption request did not involve "special circumstances," and that the request therefore must be denied as a matter of law. The Board considered the following three factors in reaching this conclusion:

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<sup>89</sup> See, e.g., NRC Staff's Proposed Findings of Fact and Conclusions of Law, at 32 (Feb. 10, 2012) (citing Ex. NRC000040, Press Release, KPMG, Goodwill Impairment in 2009 (June 12, 2009) (ML11349A258) (non-public) (KPMG Press Release) (According to a recent study by KPMG, goodwill impairment in the U.S. "in 2008 more than doubled to US \$339.6 billion, with the median charge going up tenfold. . . . The number of companies in the U.S. study that had impairment in 2008 increased to nearly 20 percent; up almost three-fold from the previous year.")).

The Board explained that goodwill "[i]mpairment occurs when the fair market value of goodwill is less than [a company's] stated value." LBP-12-6, 75 NRC at \_\_ (slip op. at 47-48).

<sup>90</sup> Ex. NRC000001, NRC Direct Testimony, at 18 (A.40) (Przygodzki), 30 (A.63) (Przygodzki).

<sup>91</sup> See LBP-11-19, 74 NRC 61 (2011).

<sup>92</sup> LBP-12-6, 75 NRC at \_\_ (slip op. at 19).

<sup>93</sup> *Id.* at \_\_ (slip op. at 13).

(i) the circumstances on which Honeywell relied in support of its request are not expected to be temporary, (ii) the Commission considered those same circumstances when promulgating the rule from which Honeywell sought a waiver, and (iii) these first two factors are applicable regardless of whether the Board considered Honeywell's circumstances as of 2009 or as of the time it issued LBP-12-6.<sup>94</sup>

Alternatively, the Board concluded that Honeywell's exemption request failed to satisfy the requirements specifically laid out in 10 C.F.R. § 40.14. The Board reasoned that a grant of the requested exemption could adversely affect the availability of adequate decommissioning funds for Honeywell's Metropolis facility and that, therefore, such a grant could endanger life or property and would be contrary to the public interest.<sup>95</sup> The Board reached this second conclusion without referring to or relying upon the "special circumstances" requirement set forth in 10 C.F.R. § 50.12.

Honeywell has petitioned for review of LBP-12-6.<sup>96</sup> The Staff opposes the petition.<sup>97</sup>

### III. ANALYSIS

As a threshold matter, we conclude that Honeywell has satisfied the regulatory standards for our discretionary review of LBP-12-6, and we grant its petition. Honeywell has identified a substantial question as to whether the Board decision reaches at least one "necessary legal conclusion without governing precedent" or addresses at least one "substantial and important question of law, policy or discretion."<sup>98</sup> Specifically, Honeywell argues that the

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<sup>94</sup> *Id.* at \_\_\_ (slip op. at 50).

<sup>95</sup> *Id.* at \_\_\_ (slip op. at 51).

<sup>96</sup> See generally Petition for Review; Honeywell Reply.

<sup>97</sup> See *NRC Staff's Answer to Honeywell's Petition for Review* (Apr. 6, 2012) (Staff Answer).

<sup>98</sup> 10 C.F.R. § 2.341(b)(4)(ii), (iii). Under section 2.341(b)(4), we may exercise our discretion to grant a petition for review, giving due weight to the existence of a substantial question with respect to any of the following considerations:

(continued . . . )

scope of the Board's evidentiary analysis should not have been limited to the facts as they existed in 2009—more than two years prior to the decision's issuance. Honeywell also raises numerous challenges to the Board's findings of fact, which rest on a complex record.<sup>99</sup>

We begin our analysis below by examining and rejecting Honeywell's challenges to the Board's findings of fact supporting the Staff's denial of Honeywell's exemption request. We then affirm the Board's ruling that the Staff appropriately excluded from its review the facts relevant to the period after 2009.<sup>100</sup> And finally, we affirm the Board's ruling that Honeywell's 2009 request for an exemption fails to satisfy the requirements specified in 10 C.F.R. § 40.14.<sup>101</sup>

#### **A. Findings of Fact**

In analyzing a board's findings of fact, we apply the deferential "clear error" standard.<sup>102</sup> Our deference to the Board's findings in this adjudication is grounded in the fact that exemption

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- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
  - (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
  - (iii) A substantial and important question of law, policy, or discretion has been raised;
  - (iv) The conduct of the proceeding involved a prejudicial procedural error; or
  - (v) Any other consideration which the Commission may deem to be in the public interest.

<sup>99</sup> *Id.* § 2.341(b)(4)(i).

<sup>100</sup> LBP-12-6, 75 NRC at \_\_\_ (slip op. at 19).

<sup>101</sup> Because we affirm this ruling, we need not address the Board's alternative ruling and associated factual findings—which Honeywell challenges on appeal—that "special circumstances" must exist under section 50.12 before the Staff may grant Honeywell's requested exemption. See *id.* at \_\_\_ (slip op. at 14-15).

<sup>102</sup> *David Geisen*, CLI-10-23, 72 NRC 210, 224-25 & n.61 (2010) (requiring a showing that the Board's "findings are not even plausible in light of the record viewed in its entirety") (internal quotation marks deleted); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 25-27 (2003).

requests are by their very nature equitable—and therefore fact-driven.<sup>103</sup> This level of deference is particularly high where a board’s factual determinations are based in significant part on its assessment of expert testimony and the credibility of the witnesses offering that testimony.<sup>104</sup> Such deference is applicable in this proceeding, where the Board heard, questioned, and evaluated testimony from two Honeywell witnesses and five Staff witnesses.<sup>105</sup>

In reviewing the Board’s determination, we provide here only an overview of the Board’s analysis sufficient to assess Honeywell’s claims of error. Our factual inquiry is focused on whether, given the record as a whole, the Board committed clear error in the way it weighed the Staff’s and Honeywell’s conflicting evidence. We need not address every instance where the Board referred to or analyzed Honeywell’s factual assertions and arguments. Nonetheless, we have reviewed this extensive record thoroughly and have found substantial evidence in the record to support each Board finding, including those which we do not address in particular. Because the issues in this case have been sharply contested, we will explain our view of the case in some detail.<sup>106</sup>

At bottom, Honeywell argued to the Board that the company’s proposed alternative test for determining whether Honeywell met the 10:1 ratio criterion—a test that included the intangible asset of goodwill—would provide a “more than ample basis for the NRC to conclude

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<sup>103</sup> We defer to board rulings on exemptions both in terms of factual determinations and associated balancing of the equities. We have held that exemption decisions “should take into account the *equities* of each situation,” and we have given examples of the kinds of *facts* that must be weighed when determining whether to grant an exemption. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154, 1156 n.3 (1984) (emphasis added).

<sup>104</sup> See *PFS*, CLI-03-8, 58 NRC at 26 (ruling on the Board’s review of an exemption request) (“Our deference to the Board as factfinder is particularly great where, as here, the Board bases its findings of fact in significant part on the credibility of the witnesses”).

<sup>105</sup> See *LBP-12-6*, 75 NRC at \_\_\_ (slip op. at 21-22).

<sup>106</sup> See *Geisen*, CLI-10-23, 72 NRC at 220.

that . . . decommissioning funds will be available for the [Metropolis facility].”<sup>107</sup> Honeywell would have us conclude either that the Board’s findings to the contrary were “not even plausible” or that they “do not adequately support the conclusions reached in the decision.”<sup>108</sup>

As explained below, we do not find clear error in the Board’s weighing of the evidence, in its findings of fact, or in how its findings of fact supported its conclusions of law. The Board’s findings of fact make clear that the Board reasonably considered evidence from both Honeywell and the Staff in reaching its ultimate determination.<sup>109</sup> The presence of evidence in Honeywell’s favor—to which Honeywell repeatedly directs our attention on appeal—does not, without more, warrant reversal of the Board’s decision.<sup>110</sup> The question before us is not whether we would have made different factual findings than those of the Board. Rather, it is whether this Board’s findings of fact are so lacking in record support as to be “clearly erroneous.”<sup>111</sup> Our review of the record confirms that the Staff presented credible evidence supporting its denial of the 2009 exemption, and refutes Honeywell’s claim that the Board’s findings of fact are “not even

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<sup>107</sup> Ex. HNY000001, Testimony of John Tus and Bruce Den Uyl (Oct. 14, 2011), at 6 (Honeywell Direct Testimony) (quoted in LBP-12-6, 75 NRC at \_\_\_ (slip op. at 23)).

<sup>108</sup> Petition for Review at 12.

<sup>109</sup> The Board considered both parties’ lines of argument, and it provided a detailed description of them and its underlying facts in its decision. LBP-12-6, 75 NRC at \_\_\_-\_\_\_ (slip op. at 21-50). Ultimately, however, after weighing the conflicting evidence and arguments, the Board found that Honeywell’s proffered facts and arguments, when taken in their entirety, were less persuasive than those of the Staff.

<sup>110</sup> Honeywell essentially challenges the way the Board accorded weight to Honeywell’s and the Staff’s evidence—the kind of determination about which we have consistently declined to second-guess our boards. See, e.g., *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-1, 75 NRC \_\_\_, \_\_\_ (Feb. 9, 2012) (slip op. at 9) (“While we have the authority to undertake a *de novo* factual review, where a Board’s decision rests on a *weighing* of extensive fact-specific evidence presented by technical experts we generally will defer to the Board’s factual findings, unless there appears to be a ‘clearly erroneous’ factual finding or related oversight”) (emphasis added, footnote omitted).

<sup>111</sup> *Id.*; *Geisen*, CLI-10-23, 72 NRC at 224-25 & n.61; *PFS*, CLI-03-8, 58 NRC at 26.

plausible.”<sup>112</sup> We examine below the five specific categories of factual findings Honeywell challenges on appeal, and find sufficient evidence in the record to support each one.

### **1. Access to alternate sources of funds**

Honeywell proffers two challenges to the Board’s findings of fact on this topic. First, it challenges the Board’s finding that “Honeywell’s access to funds under its [revolving] credit facility could be terminated if Honeywell were to fall into financial distress.”<sup>113</sup> Honeywell directs our attention to its \$2.8 billion five-year committed revolving credit facility that contains no financial covenants and that, therefore, could be drawn upon immediately for decommissioning funds—“even if Honeywell were in some hypothetical financial distress just short of default.”<sup>114</sup> According to Honeywell, this conclusion was neither contradicted nor challenged, thereby rendering the Board’s finding “clearly erroneous and contrary to the record.”<sup>115</sup>

We recognize, as did the Board, that Honeywell has access to this \$2.8 billion revolving credit facility.<sup>116</sup> Nonetheless, one of Honeywell’s own exhibits indicates that the credit facility

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<sup>112</sup> Petition for Review at 12.

<sup>113</sup> *Id.* at 13 (quoting LBP-12-6, 75 NRC at \_\_\_ (slip op. at 50) (Finding 95)).

<sup>114</sup> Petition for Review at 13. According to the U.S. Court of Appeals for the Fifth Circuit, the term “credit facility” carries various definitions, such as:

. . . “a business system set up to offer credit services to those who possess personal or business credit;” . . . “arrangement with a bank or supplier to have credit so as to buy goods;” “[a]n agreement between a bank and a company that grants the company a line of credit with the bank;” credit facilities are “usually documented by a formal loan agreement” and constitute “a legally binding commitment of the bank.”

*Mullins v. TestAmerica, Inc*, 564 F.3d 386, 410 n.10 (5th Cir. 2009) (citations omitted). A “revolving credit” arrangement is one type of credit facility, *id.*, and “may be used repeatedly up to the limit specified after partial or total repayments have been made.” *Webster’s Third New International Dictionary of the English Language, Unabridged* 1945 (2002).

<sup>115</sup> Petition for Review at 13.

<sup>116</sup> LBP-12-6, 75 NRC at \_\_\_ (slip op. at 40). More generally, the Board also concluded that, in 2009, Honeywell was a financially sound company. *Id.* at \_\_\_ (slip op. at 37).

did contain conditions, even if it did not contain covenants.<sup>117</sup> Also, as the Staff observes, “Honeywell’s credit facility is not an asset owned by the company—it is listed under ‘Long-term Debt and Credit Agreements’ on Honeywell’s 10-K report for 2008 ([Ex.] HNY000018 at 76)—nor is it a source of funding that is committed for NRC decommissioning purposes.”<sup>118</sup>

According to the Staff, “Honeywell would be assuming additional liabilities that could further limit its ability to obtain decommissioning funding” if it were to draw on the credit facility for other purposes.<sup>119</sup> Finally, Honeywell’s statement that it could draw down its line of credit even if it “were in some hypothetical financial distress *just short of default*,”<sup>120</sup> acknowledges by clear inference that Honeywell could *not* draw down on its credit line if it *were actually* in default on its bond payment obligations.

Honeywell’s second challenge is directed to the Board’s finding that “obtaining alternate financial assurance could be difficult during a period of tightening loan conditions, giving rise to the risk that a licensee could be unable to provide financial assurance.”<sup>121</sup> According to Honeywell, the Board erroneously focused on “NRC licensees *generally*, rather than Honeywell *specifically*.”<sup>122</sup> In support, Honeywell directs our attention to another of the Board’s findings of fact—that Honeywell did not experience any limitations on its ability to access the commercial

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<sup>117</sup> Ex. HNY000018, Honeywell International, Inc., SEC Form 10-K (Feb. 13, 2009), at 76-77. The Board cited this exhibit to support its finding that “[a]lthough Honeywell contends that its revolving credit facility might be used to pay decommissioning costs, Honeywell’s access to funds under its credit facility could be terminated if Honeywell were to fall into financial distress.” LBP-12-6, 75 NRC at \_\_\_ (slip op. at 50) (Finding 95).

<sup>118</sup> Staff Answer at 16 n.52.

<sup>119</sup> *Id.*

<sup>120</sup> Petition for Review at 13 (emphasis added).

<sup>121</sup> *Id.* (paraphrasing LBP-12-6, 75 NRC at \_\_\_ (slip op. at 4, 5) (Finding 68)).

<sup>122</sup> *Id.* (emphases in original).

paper markets throughout the recent financial crisis.<sup>123</sup> In addition, Honeywell claims that the Board erred “by making a *predictive* finding when, in fact, there is a contrary *historic* record.”<sup>124</sup>

Honeywell disregards the Staff’s evidence that a default is not the only circumstance about which the NRC is concerned, and that a licensee such as Honeywell could find it more difficult to obtain third-party financial assurance if its bond rating were downgraded.<sup>125</sup> We see no error in the Board focusing on licensees generally or in the Board’s “predictive finding.” In doing so, the Board responded to Honeywell’s arguments regarding other investment-grade companies and Honeywell’s own anticipated ability to obtain alternative financial assurance.<sup>126</sup> As we interpret LBP-12-6, the Board did not find that Honeywell would have problems securing funding, but rather concluded that the economic climate and decreased reliability of bond ratings raised reasonable concerns about Honeywell’s ability to demonstrate financial assurance by referring to its general financial health. The Board therefore found Honeywell’s reliance upon indicia of its financial health to be significantly complicated—and, from a regulatory standpoint, rendered more questionable—by broader economic developments.

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<sup>123</sup> *Id.* at 13-14 (referring to LBP-12-6, 75 NRC at \_\_\_ (slip op. at 38) (Finding 28)).

<sup>124</sup> *Id.* at 14 (emphases in original).

<sup>125</sup> Ex. NRC000053, NRC Staff’s Reply Testimony (Nov. 3, 2011), at 8-9 (A.13) (Przygodzki, Bailey) (NRC Reply Testimony):

Circumstances short of default could also have affected Honeywell’s ability to timely fund decommissioning activities. If Honeywell’s bond rating dropped significantly in a short period of time, it might have difficulty meeting the Appendix C requirement that it establish alternate financial assurance within 120 days after notifying the NRC of its downgrade. Obtaining alternate financial assurance in a timely manner could have been difficult during a credit crunch like [the one] we saw in 2008 and 2009, when there was a sudden tightening of loan conditions.

*Accord id.* at 19 (A.32) (Przygodzki, Kline, Collier).

<sup>126</sup> Regarding Honeywell’s arguments as to other companies, see Petition for Review at 14-16, 17 n.54, and cited portions of the record. Regarding Honeywell’s anticipated ability to obtain alternative financial assurance, see Petition for Review at 18 and cited portions of the record.

In assessing Honeywell's reasons for an exemption based on its financial health, the Board appropriately considered the larger economic context and its potential to significantly affect Honeywell's access to the funds necessary to satisfy its decommissioning funding obligations. Indeed, the Board examined this larger context in other, related findings of fact.<sup>127</sup> Taking into account the economic climate in 2009, the Board reasonably concluded that widespread economic concerns (especially regarding bond ratings) in that period created substantial uncertainty as to whether Honeywell might experience sudden financial changes that could jeopardize its decommissioning funding assurance.<sup>128</sup>

## **2. Reliability of bond ratings**

Honeywell presents two arguments regarding the reliability of bond ratings. First, without more, it asserts that the record fails to support the Board's finding that Honeywell's bond ratings are not a reliable indication of the company's financial strength.<sup>129</sup> Honeywell does not dispute the presence of contrary evidence in the record, but instead merely reiterates its earlier arguments on the merits of this issue. We find ample evidence to support the Board's finding. For instance, during its review of the 2009 exemption request, the Staff identified significant concerns about the reliability of bond ratings.<sup>130</sup> Fourteen companies with investment-grade bond ratings defaulted in 2008, and eleven such companies in 2009—compared to just two investment-grade defaults for Moody's and five for Standard & Poor's between 2002 and

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<sup>127</sup> See LBP-12-6, 75 NRC at \_\_\_ (slip op. at 41-45) (Findings 47-67).

<sup>128</sup> See, e.g., *id.* at \_\_\_ (slip op. at 41) (Findings 49, 51).

<sup>129</sup> Petition for Review at 14 (citing LBP-12-6, 75 NRC at \_\_\_ (slip op. at 40) (Finding 46)). We repeatedly have expressed our disapproval of parties presenting cursory arguments on appeal. See, e.g., *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997) ("A 'cursory assertion' is insufficient to raise an issue for appeal" (quoting *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 272 (1996))).

<sup>130</sup> See Staff Answer at 17-18.

2007.<sup>131</sup> In this respect, the Board acknowledged, but ultimately rejected, Honeywell testimony that “bond ratings [were] strong indicators of Honeywell’s financial strength.”<sup>132</sup> For example, the Board reasonably relied upon the Staff’s testimony that “the global economic downturn in late 2008 had cast doubts on corporate bond ratings—which partially constituted the grounds upon which the NRC Staff had relied in granting Honeywell’s 2006 and 2008 exemption requests,”<sup>133</sup> that “the global financial crisis had entered a far more serious phase by the time the NRC Staff was reviewing Honeywell’s 2009 exemption request,” and that as a result, “the reliability of the bond ratings was being called into question.”<sup>134</sup> In sum, even if the overall

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<sup>131</sup> *Id.* at 17 & nn.55-56 (citing Ex. HNY000024, Moody’s Global Credit Policy, Corporate Default and Recovery Rates, 1920-2008 (ML11349A209) (Feb. 2009), at 19 (non-public), *available at* <http://www.moodys.com/sites/products/DefaultResearch/2007400000578875.pdf> (last visited Jan. 7, 2013); Ex. HNY000025, Moody’s Corporate Default and Recovery Rates, 1920-2009, at 24 (ML11349A210) (non-public) (2009 Default and Recovery Rates), *available at* [http://ismymoneysafe.org/pdf/Moody's\\_corporate\\_default\\_and\\_recovery\\_rates\\_2009.pdf](http://ismymoneysafe.org/pdf/Moody's_corporate_default_and_recovery_rates_2009.pdf) (last visited Jan. 7, 2013); Ex. HNY000026, Moody’s Corporate Default and Recovery Rates, 1920-2010 (Feb. 2011), at 15 (ML11349A211) (non-public) (2010 Default and Recovery Rates), *available at* <http://efinance.org.cn/cn/FEben/Corporate%20Default%20and%20Recovery%20Rates,1920-2010.pdf> (last visited Jan. 7, 2013); Ex. HNY000030, Standard and Poor’s, Default, Transition and Recovery: 2008 Annual Global Corporate Default Study and Rating Transitions (Apr. 2, 2009), at 9, Table 4 (ML11349A215) (non-public) (2008 S&P Annual Default Study), *available at* [http://www.valuation.co.il/data/wacc/SnP-Default\\_Transition\\_and\\_Recovery\\_2008.pdf](http://www.valuation.co.il/data/wacc/SnP-Default_Transition_and_Recovery_2008.pdf) (last visited Jan. 7, 2013); Ex. HNY000031, Standard & Poor’s, Default, Transition, and Recovery: 2009 Annual Global Corporate Default Study and Rating Transitions, at 1-2, Table 1 (ML11287A279) (non-public) (2009 S&P Annual Default Study), *available at* <http://www.standardandpoors.com/ratings/articles/en/us/?assetID=1245207201119> (last visited Jan. 7, 2013)).

<sup>132</sup> LBP-12-6, 75 NRC at \_\_\_ (slip op. at 23). *See also id.* at \_\_\_ & nn.118-22 (slip op. at 23-24 & nn.118-22) (citing Ex. HNY000001, Honeywell Direct Testimony, at 8-13, 15, 25-26, 30-31, 33-35, 38; Ex. HNY000059, Rebuttal Testimony of John Tus and Bruce Den Uyl (Nov. 3, 2011), at 4-5; Tr. at 35-37 (Tus), 43-47 (Tus) (Honeywell Rebuttal Testimony)).

<sup>133</sup> LBP-12-6, 75 NRC at \_\_\_ (slip op. at 9) (citing Ex. HNY000012, Kinneman Letter, at 4-6; Ex. NRC000001, NRC Direct Testimony, at 7).

<sup>134</sup> LBP-12-6, 75 NRC at \_\_\_ (slip op. at 30) (citing Ex. NRC000001, NRC Direct Testimony, at 9-13, 29; Ex. NRC000053, NRC Reply Testimony, at 3, 9, 11-12). *See* LBP-12-6, 75 NRC at \_\_\_ (slip op. at 30-31) (citing Ex. NRC000001, NRC Direct Testimony, at 12; Ex. NRC000053, NRC Reply Testimony, at 5-9, 15) (footnotes omitted):

(continued . . . )

number of business defaults remained small during the relevant period, the record still supports the Board's conclusion that, when the Staff reviewed the exemption request in 2009, significant concerns existed regarding the reliability of bond ratings, including those for companies with the same bond ratings as Honeywell.

Honeywell also argues that the Board failed "to provide plausible record support for its assertion that bond credit ratings agencies are reluctant to downgrade ratings."<sup>135</sup> We disagree. The Board found that, by 2009, the World Bank and many others (e.g., the U.S. Securities and Exchange Commission, European Union, G-20 leadership<sup>136</sup>) were questioning the rating

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the NRC Staff witnesses [Messrs. Przygodzki, Kline, and Fredrichs] cited a 2009 World Bank report stating that "[i]n the United States . . . faulty credit ratings and flawed rating processes are widely perceived as being among the key contributors to the global financial crisis . . . ." Specifically, Mr. Przygodzki stated that the NRC Staff was concerned that the credit rating agencies either might not timely react to market events or might be reluctant to downgrade the ratings of certain companies for fear of the adverse impact that a downgrade could have on the company. Even if bond ratings were reliable in 2009, Messrs. Przygodzki, Kline, and Fredrichs all reiterated that "although bonds ratings are relevant to whether a licensee can self-guarantee decommissioning funding, they by no means address all of the NRC's concerns in this area."

See also LBP-12-6, 75 NRC at \_\_\_ (slip op. at 33) ("Mr. Przygodzki testified that the April 2011 denial letter found that the unreliability of bond ratings during the global financial crisis, together with Honeywell's increased reliance on relatively illiquid goodwill, all elevated the risk that funds might not be available to decommission the [Metropolis] facility when needed") (citing Tr. at 81; Ex. NRC000001, NRC Direct Testimony, at 20).

<sup>135</sup> Petition for Review at 15 (referring to LBP-12-6, 75 NRC at \_\_\_ (slip op. at 43)).

<sup>136</sup> See Ex. NRC000001, NRC Direct Testimony, at 12 (A.25) (Przygodzki); Ex. NRC000044, Jonathan Katz, Emanuel Salinas & Constantinos Stephanou, *The World Bank Group, Credit Rating Agencies: No Easy Regulatory Solutions* (Oct. 2009) (World Bank Group); Ex. NRC000046, Richard J. Herring, Pew Financial Reform Project, *Policy Issues Concerning the Reform of the Credit Rating Agencies* (2009) (ML11349A262) (non-public), *available at* <http://fic.wharton.upenn.edu/fic/policy%20page/Securitization-2.pdf> (last visited Jan. 7, 2013); Ex. NRC000053, NRC Reply Testimony, at 9 (A.14) (Bailey, Przygodzki, Kline), 11-12 (A.17) (Przygodzki, Bailey), 13 (A.20) (Bailey), 15 (A.24) (Przygodzki, Kline); Ex. NRC000060, U.S. Securities and Exchange Commission, *Summary Report of Issues Identified in the Commission Staff's Examinations of Select Credit Rating Agencies* (July 2008)).

agencies' methods for generating their bond ratings—a point on which the Board explicitly relied.<sup>137</sup> More generally, the Board found record support for its following conclusion:

By 2009, the financial downturn in late 2008 also had raised significant questions about the reliability of bond ratings in general. Credit rating agencies came under widespread scrutiny in 2008 and 2009 for failing to accurately rate companies that had fallen into financial distress. For example, Standard & Poor's did not downgrade the "A" bond rating of Lehman Brothers until the very same day the company filed for bankruptcy, September 15, 2008.<sup>138</sup>

In sum, the evidence sufficiently supports the Board's findings of fact regarding the potential unreliability of bond ratings.

### **3. Basis for presumption of "near-instantaneous" default**

Honeywell argues that the record does not support the Board's assumption that Honeywell itself could experience "near-instantaneous" default, particularly given the company's strong financial condition.<sup>139</sup> Honeywell further asserts that, given the NRC's requirement that Honeywell annually perform the financial test in Part 30, Appendix C, the Board lacked grounds for presuming that Honeywell's bonds could decline from an "A"-rating to default within a year.<sup>140</sup>

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<sup>137</sup> Ex. NRC000057, Press Release, U.S. Securities and Exchange Commission, SEC Votes on Measures to Further Strengthen Oversight of Credit Rating Agencies (Sept. 17, 2009); Ex. NRC000058, Fact Sheet, U.S. Securities and Exchange Commission, Strengthening Oversight of Credit Rating Agencies[;] Open Meeting of the Securities and Exchange Commission (Sept. 17, 2009); Ex. NRC000044, World Bank Group, at 5. See *generally* LBP-12-6, 75 NRC at \_\_\_ & nn.230-32 (slip op. at 43-44 & nn.230-32) (Findings 57-62) (citing these exhibits).

<sup>138</sup> LBP-12-6, 75 NRC at \_\_\_ & n.226 (slip op. at 42 & n.226) (Finding 55) (citing Ex. NRC000026, Standard & Poor's, Research Update: Lehman Bros. Holdings Downgraded to 'Selective Default'; Other Lehman Entities To 'BB-' Or 'R' (Sept.15, 2008) (ML11349A255) (non-public), *available at* <http://www.standardandpoors.com/ratings/articles/en/us/?assetID=1245210943266> (last visited Jan. 7, 2013)). See *also* LBP-12-6, 75 NRC at \_\_\_ (slip op. at 30-31, 33), and cited record evidence.

<sup>139</sup> Petition for Review at 16-17.

<sup>140</sup> *Id.* at 17. Honeywell considers this assumption to underlie Findings 62, 67, 79, 91, 94, and 95. *Id.* at 16-17 (citing LBP-12-6, 75 NRC at \_\_\_, \_\_\_ (slip op. at 44-45, 47, 49-50)).

We find no error in the Board's consideration of general economic facts in addition to those specific to Honeywell in ruling on its exemption request.<sup>141</sup> Indeed, Honeywell itself presented an abundance of evidence regarding other companies and general economic conditions.<sup>142</sup> A licensee's use of the self-guarantee mechanism to satisfy our decommissioning funding requirements is necessarily predictive, requiring an inquiry into how other, similar companies have performed in the past to forecast assurance of the licensee's ready access to decommissioning funds when needed. Here, record evidence does demonstrate an increase, between late 2008 and the end of 2009, in the number of defaults by investment-grade companies in less than a year, and also that the general problems with bond ratings at the time might have been obscuring financial distress *already underway* even at companies with ratings like Honeywell's.<sup>143</sup> The Board therefore reasonably considered economic facts not specific to Honeywell to provide the correct and accurate context for the Board's predictive analysis.

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<sup>141</sup> Regarding corporate defaults generally, the Board relied on evidence submitted by both Honeywell and the Staff. See LBP-12-6, 75 NRC at \_\_\_ & n.122-24 (slip op. at 41-42 & nn.122-24) (citing Ex. HNY000025, 2009 Default and Recovery Rates, at 3 (non-public); Ex. NRC000039, David Wessel, *Another Milestone: U.S. Corporate Defaults to Date Match Total for All '08*, Wall Street Journal (May 29, 2009) (ML11349A257) (non-public) (Wessel), available at <http://blogs.wsj.com/economics/2009/05/29/another-milestone-us-corporate-defaults-to-date-match-total-for-all-08/> (last visited Jan. 7, 2013); Ex. NRC000041, *U.S. Corporate Defaults*, The Economist (June 18, 2009) (ML11349A260) (non-public) (Economist), available at <http://www.economist.com/node/13872815> (last visited Jan. 7, 2013); Ex. NRC000043, Chelsea Emery & Emily Chasan, *Unprecedented U.S. Corp. Defaults Seen for '09*, Reuters Business and Financial News (Sept. 29, 2009) (ML11349A261) (non-public) (Reuters), available at <http://www.reuters.com/assets/print?aid=USTRE58R4QO20090929> (last visited Jan. 7, 2013)), \_\_\_ & nn.234-36 (slip op. at 44 & nn.234-36) (citing Ex. HNY000030, 2008 S&P Annual Default Study, at 9, Table 4; Ex. HNY000031, 2009 S&P Annual Default Study, at 1-2, Table 1 (non-public)); Ex. HNY000026, 2010 Default and Recovery Rates, at 15 (non-public)).

<sup>142</sup> See, e.g., exhibits cited in note 131, *supra*.

<sup>143</sup> See, e.g., Ex. NRC000001, NRC Direct Testimony, at 11-12 (A.25) (Przygodzki), 20 (A.43) (Przygodzki), 26 (A.56) (Przygodzki, Kline, Fredrichs), 29 (A.61) (Przygodzki), 29-30 (A.63) (Przygodzki); Ex. NRC000053, NRC Reply Testimony, at 6-7 (A.10) (Bailey, Przygodzki), 7-8 (A.11) (Przygodzki, Kline), 8 (A.12) (Bailey, Przygodzki), 8-9 (Przygodzki, Bailey), 9 (A.14) (Bailey, Przygodzki, Kline).

#### **4. Availability and liquidity of asset classes**

Honeywell argues that the record does not support the Board's findings regarding the relative availability and liquidity of different classes of assets. In particular, Honeywell objects to the Board's finding that, "compared to tangible assets . . . in certain circumstances goodwill may be relatively illiquid and difficult to convert promptly into cash," and to findings that "selling a business or business line can involve numerous steps" and "is often much more complicated and more time-consuming than the sale of only tangible assets like buildings, vehicles, or equipment."<sup>144</sup> Honeywell cites evidence "showing that, in many circumstances, sale of intangible assets is actually quicker than selling used equipment piecemeal[,]" offers examples of intangible assets claimed to be more fungible than tangible assets, and asserts that "the record contains no examples of delays in converting intangible assets to cash or, for that matter, quick sales of tangible assets."<sup>145</sup>

The Board, however, relied on other evidence supporting its finding to the contrary<sup>146</sup> that the sale of a business or business line can involve many steps, such that selling an entire business "is often much more complicated and more time-consuming than the sale of only tangible assets."<sup>147</sup> The possibility that select intangible assets might be more liquid than certain tangible assets does not undermine the Board's conclusions as to the relative illiquidity

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<sup>144</sup> Petition for Review at 18 (quoting LBP-12-6, 75 NRC at \_\_ (Finding 72), \_\_ (Findings 75 & 76) (slip op. at 45 (Finding 72), 46 (Findings 75 & 76)).

<sup>145</sup> *Id.* at 19.

<sup>146</sup> See Ex. NRC000053, NRC Reply Testimony, at 18-19 (A.30) Przygodzki, Collier), and (A.31) (Collier) (*cited in* LBP-12-6, 75 NRC at \_\_ & nn.244-45 (slip op. at 46 nn.244-45)). See *also* Ex. NRC000011, Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities; Financial Requirements, Revised Interim Final Rules, 47 Fed. Reg. 15,032, 15,035 (Apr. 7, 1982); Ex. NRC000001, NRC Direct Testimony, at 16-17 (A.37) (Przygodzki, Fredrichs); Ex. NRC000053, NRC Reply Testimony, at 17-18 (A.29) (Przygodzki, Collier), 18 (A.30) (Przygodzki, Collier), 18-19 (A.31) (Collier), 20 (A.34) (Przygodzki, Collier), 21-22 (A.36) (Przygodzki, Fredrichs); Tr. at 34-35 (Tus), 69-70 (Tus), 81-82 (Przygodzki), 94-97 (Fredrichs).

<sup>147</sup> LBP-12-6, 75 NRC at \_\_ & nn.244-45 (slip op. at 46 & nn.244-45).

of intangible assets. That Honeywell provided exceptions to this general principle does not demonstrate clear error by the Board.

As discussed above, the Board was not required to address every piece of record evidence. Its decision not to do so here does not constitute clear error, nor does it indicate that the Board did not take that evidence into account.

Honeywell also argues that the Board erred in finding that bond indentures may restrict its ability to sell certain properties and thereby raise cash from the sale of goodwill associated with those properties. According to Honeywell, the Board erred because Honeywell's bond indentures only prohibit it from using properties as collateral for loans, not from selling the properties.<sup>148</sup> Here, however, the Board found that Honeywell's goodwill could be encumbered *either* by restrictions on the sale of properties *or* by restrictions preventing Honeywell from using properties as collateral for loans,<sup>149</sup> and Honeywell has acknowledged that it is subject to the second kind of restriction.<sup>150</sup> As a result, Honeywell has not demonstrated that the Board erred in considering these restrictions.

## **5. Goodwill impairment**

Finally, Honeywell challenges "the Board's concern that Honeywell might experience goodwill impairment of a magnitude that could impact the financial test outcome."<sup>151</sup> Honeywell

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<sup>148</sup> Petition for Review at 20-21 (citing LBP-12-6, 75 NRC \_\_\_ (slip op. at 46-47) (Findings 77 & 78)).

<sup>149</sup> See LBP-12-6, 75 NRC at \_\_\_ (slip op. at 46-47).

<sup>150</sup> See *Honeywell's Proposed Findings of Fact and Conclusions of Law* (Feb. 10, 2012), at 38 n.167 (Honeywell Proposed Findings) ("The covenants assure that facilities that generate income are not being used as collateral for loans and therefore will be available to generate cash to pay for decommissioning"); Petition for Review at 20 (same, citing Ex. HNY000065, Affidavit of John Tus (Jan. 4, 2012); Ex. HNY000066, Affidavit of John Tus (Jan. 12, 2012)).

<sup>151</sup> Petition for Review at 21. The Board repeatedly addresses goodwill impairment in LBP-12-6. See 75 NRC at \_\_\_ (Findings 41-42), \_\_\_ (Findings 84-90) (slip op. at 40 (Findings 41-42), 47-49 (Findings 84-90)).

points out that it has taken no goodwill impairment charges since at least 2006 and further asserts that the two examples cited by the Board and the NRC Staff (Western Nuclear and Tyco) provide no insights into Honeywell's financial condition.<sup>152</sup>

We find no error in the Board's reliance upon the experience of two major corporations in goodwill impairment charges. Even if Honeywell were correct as to these points (an issue we need not reach), it does not follow that the Board's finding lacked evidentiary support.

Honeywell overlooks other evidence upon which the Board relied.<sup>153</sup> KPMG cautioned that goodwill valuation "is not an exact science and that it has never been more difficult than it is now to ascribe a value to an entity."<sup>154</sup> It reported that, in the United States, "goodwill impairment in 2008 more than doubled to US \$339.6 billion, with the median charge going up ten-fold . . . [and] [t]he number of companies in the U.S. study that had impairment in 2008 increased to nearly 20 percent; up almost three-fold from the previous year."<sup>155</sup> Indeed, KPMG predicted at the time that "the situation could actually worsen still further during the remainder of 2009."<sup>156</sup>

As discussed, we consider economic projections like this to provide a relevant context for the

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<sup>152</sup> Petition for Review at 21-22.

<sup>153</sup> See LBP-12-6, 75 NRC at \_\_\_ & nn.250-57 (slip op. at 47-49 & nn.250-57). The Board's findings on goodwill impairment are supported by: Ex. NRC000001, NRC Direct Testimony, at 17-19 (A.39-A.40) (Przygodzki); Ex. NRC000018, Honeywell Financial Data Relied on in Exemption Requests (Sept. 15, 2011); Ex. NRC000033, Press Release, Federal Deposit Insurance Corporation, Emergency Economic Stabilization Act of 2008 Temporarily Increases Basic FDIC Insurance Coverage from \$100,000 to \$250,000 Per Depositor (Oct. 7, 2008); Ex. NRC000036, Freeport-McMoRan Copper & Gold Inc., 2008 Form 10-K, at 141; Ex. NRC000040, KPMG Press Release; Ex. NRC000051, Tyco International Ltd., Amendment No. 2 on Form 10-K/A to Form 10-K (for the fiscal year ended Sept. 30, 2002), at 94-95; Ex. NRC000053, NRC Reply Testimony at 23-24 (A.39) (Przygodzki, Kline, Fredrichs); and Tr. at 86 (Przygodzki), 88 (Fredrichs), 92-93 (Przygodzki, Fredrichs).

<sup>154</sup> Ex. NRC000040, KPMG Press Release; LBP-12-6, 75 NRC at \_\_\_ (slip op. at 48).

<sup>155</sup> Ex. NRC000040, KPMG Press Release; LBP-12-6, 75 NRC at \_\_\_ (slip op. at 48-49).

<sup>156</sup> Ex. NRC000040, KPMG Press Release; LBP-12-6, 75 NRC at \_\_\_ (slip op. at 49).

Staff's (and the Board's) decisions. Given that the record supports the Board's findings on goodwill impairment,<sup>157</sup> Honeywell's assertions of "clear error" are without merit.

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In sum, we conclude that Honeywell has failed to demonstrate that the Board committed clear error in its findings of fact regarding access to alternate sources of funds, reliability of bond ratings, rapid default, the availability and liquidity of asset classes, and goodwill impairment.

**B. Conclusions of Law**

We reject Honeywell's interrelated arguments that the Board should have considered financial facts that became available only after 2009 and should have extended the scope of the exemption past its one-year period. We then consider the Board's conclusion that Honeywell failed to satisfy the criteria of section 40.14. Next, we address this agency's lack of reliance upon either the 2008 proposed rule or the 2012 final rule on decommissioning funding. Finally, we reject Honeywell's *de facto* challenge to the current section 40.14.<sup>158</sup>

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<sup>157</sup> The Board gave substantial attention to goodwill impairment. See 75 NRC at \_\_\_ (Findings 41-42), \_\_\_ (Findings 84-90) (slip op. at 40 (Findings 41-42), 47-49 (Findings 84-90)).

<sup>158</sup> At Honeywell's request (and without objection by the Staff), the Board reviewed the legal aspects of the exemption request *de novo*. LBP-12-6, 75 NRC at \_\_\_ (slip op. at 13). But the Board did not consider the difference between a license amendment, which is something to which a licensee is *entitled* if it satisfies our regulatory requirements, and an exemption, which is an action solely within the Staff's *discretion* to provide. Here, the exemption was the essence of the requested relief, and the license amendment's sole function was to document the exemption. For this reason, the Board should have applied the "abuse of discretion" standard of review applicable to an exemption determination rather than the *de novo* standard applicable to a staff decision on a license amendment application. This conclusion is consistent with our own standards when reviewing other discretionary staff actions not subject to a hearing opportunity. See, e.g., *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 433 (1978) (involving a Director's denial of a request to initiate an enforcement proceeding), *aff'd*, *Porter County Chapter of Izaak Walton League v. NRC*, 606 F.2d 1363 (D.C. Cir. 1979); *Consolidated Edison Co. of New York, Inc.* (Indian Point, Unit Nos. 1, 2, and 3), CLI-75-8, 2 NRC 173, 175-76 (1975) (involving a Director's denial of a show cause order). See also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-03-8, 57 NRC 293, 544 ("adequate justification" for the Staff's grant of an exemption request), *petition for review denied*, CLI-03-8, 58 NRC 11, 33 (2003). We conclude, however, that the Board's error is harmless, given that it found in the Staff's favor using the more rigorous standard.

**1. Consideration of Post-2009 Information**

Honeywell argues that the Board erred in ruling that its evaluation of the exemption request was limited to the information available to the Staff in December 2009, excluding the more recent information that Honeywell had provided.<sup>159</sup> In support, Honeywell asserts that the Board erred in placing itself “in the shoes of the NRC Staff as of the time that request was initially ruled upon.”<sup>160</sup> Honeywell asserts that, in making these rulings, the Board took an overly narrow reading of the D.C. Circuit’s remand decision.<sup>161</sup>

According to Honeywell, implicit in the D.C. Circuit’s decision is the assumption that, if the NRC lacks sufficient information to reach an informed decision, then the agency has a duty under the Administrative Procedure Act (APA)<sup>162</sup> to collect further information and conduct further analysis.<sup>163</sup> Honeywell argues that the Board should have considered the “current and up-to-date information in order to satisfy its obligation under the APA to assess *all* material information before it at the time of its decision.”<sup>164</sup> Essentially, Honeywell argues that the court has imposed on the NRC a mandate to reconsider its exemption request in light of new factual developments that transpired *after* the Staff’s 2009 decision.

We disagree. We do not find in that decision the assumption and implication to which Honeywell refers. The court stated that, on remand, “the Commission’s determination whether

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<sup>159</sup> Petition for Review at 8 (“The Board erred by limiting its review to information that was available as of 2009”), 9 (“The Board erred in refusing to consider information that post-dates the NRC Staff’s initial decision to deny the amendment in December 2009.”).

<sup>160</sup> *Id.* at 9 (quoting LBP-12-6, 75 NRC at \_\_\_ (slip op. at 20)). Honeywell’s discussion of this issue (Petition for Review at 8-12) refers generally to LBP-12-6, 75 NRC at \_\_\_ (slip op. at 19-21).

<sup>161</sup> Petition for Review at 9.

<sup>162</sup> 5 U.S.C. §§ 551-559.

<sup>163</sup> Petition for Review at 9.

<sup>164</sup> *Id.* (footnote omitted, emphasis in original).

to grant an exemption will turn on specific facts regarding Honeywell's financial net worth *at the relevant time.*<sup>165</sup> We find that the relevant time is the period prior to the Staff's denial of Honeywell's 2009 exemption request, i.e., the period ending in December 2009. This was the period that the Staff considered when making its decision, and the reasonableness of that decision is at issue in this adjudication.<sup>166</sup>

In determining which exhibits fall within this relevant time period and may therefore be considered, the Board did not limit its consideration to documents dated December 2009 or earlier. In several instances, the Board considered post-2009 documents that described facts occurring or conditions existing during or before December 2009. Although Honeywell criticizes the Board's refusal to consider documents that became available after 2009,<sup>167</sup> we understand Honeywell is not fundamentally concerned about the dates at the top of the documents.<sup>168</sup> Rather, Honeywell expresses concern about the time period for the facts and conditions that were described within those documents.<sup>169</sup>

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<sup>165</sup> *Honeywell*, 628 F.3d at 578 (emphasis added).

<sup>166</sup> See note 159, *supra*.

<sup>167</sup> Petition for Review at 2, 8-9.

<sup>168</sup> In fact, Honeywell pointed out an essential problem with using document dates:

While the new documents were arguably "available" to the agency in the broadest sense of the term because they had been published prior to the NRC's December 2009 decision, they presumably were not available to the agency in the sense that the agency had them in their possession and reviewed them in reaching a decision.

Honeywell Proposed Findings at 20 n.83.

<sup>169</sup> See, e.g., Petition for Review at 8 ("The Board erred by limiting its review to *information* that was available as of 2009"), 9 ("The Board erred in refusing to consider information that post-dates the NRC Staff's initial decision to deny the amendment in December 2009"); Honeywell Proposed Findings at 17 ("There are no restrictions in the regulations on the *dates of information* that can be considered by the Board"), 21 ("there is no basis for limiting the record to *information that pre-dates the [2009 Staff] decision*") (emphasis added); Honeywell Reply at 4-5:

(continued . . . )

While we agree in principle with Honeywell that the Board should not “place [itself] in the shoes of the NRC Staff” at the time the Staff made its decision in December 2009,<sup>170</sup> Honeywell has not demonstrated that the Board committed this error. The Board considered post-2009 documents that were unavailable to the Staff when it issued its December 2009 decision, though the Board considered them only insofar as they shed additional light on the facts that existed and events that occurred during or before 2009. In fact, Honeywell recognizes, and objects to, the Board’s consideration of eleven purportedly post-2009 documents, which Honeywell claims were submitted by the Staff.<sup>171</sup> Honeywell complains that the Board failed to consider similar post-2009 exhibits that it had submitted.

Honeywell’s objection is flawed. Honeywell itself submitted one of the exhibits about which it complains<sup>172</sup>—weakening its argument of disparate treatment. Also, eight of the eleven exhibits *predated* the December 2009 exemption denial.<sup>173</sup> While the three remaining exhibits

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[B]y adding facts and analysis to the record to support their ultimate conclusion (denial of the exemption) while ignoring new data and information that undermines that conclusion, the Board and the NRC Staff were allowed . . . to referee the Super Bowl having already decided which team should win the championship trophy. . . . On remand, an agency must consider all information to satisfy the Administrative Procedure Act—not just information that supports its initial position.

<sup>170</sup> Petition for Review at 9 (referring to LBP-12-6, 75 NRC at \_\_ (slip op. at 20)).

<sup>171</sup> *Id.* at 10 nn.27 & 29 (footnote omitted). Honeywell focuses on this date because it was the month in which the Staff rendered its denial of Honeywell’s third exemption request. *Id.* at 9.

<sup>172</sup> HNY000025, 2009 Default and Recovery Rates.

<sup>173</sup> See Petition for Review at 10 n.29, citing:

Ex. NRC000023, GAAPG, § 23.04, Intangible Assets (cited in LBP-12-6, 75 NRC at \_\_ n.242 (slip op. at 45-46 n.242)) (non-public). According to the Staff, this document was published in 2008. *NRC Staff’s Initial Statement of Position* (Oct. 14, 2011), at 30 n.90.

Ex. NRC000028, Jon Hilsenrath, Serena Ng, & Damian Paletta, *Worst Crisis Since ’30s, With No End Yet in Sight*, Wall St. J. (Sept. 18, 2008) (cited in LBP-12-6, 75 NRC at \_\_ n.218 (slip op. at 41 n.218)) (ML11349A256) (non-continued . . . )

were dated after December 2009, the Board cited these exhibits solely for their descriptions of events that occurred or financial climate that existed prior to 2010.<sup>174</sup> The Board's reliance on

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public), available at <http://online.wsj.com/article/SB122169431617549947.html> (last visited Jan. 7, 2013).

Ex. NRC000034, Ingo Fender & Jacob Gyntelberg, *Overview: Global Financial Crisis Spurs Unprecedented Policy Actions*, BIS Quarterly Review (Dec. 2008), at 1 (cited in LBP-12-6, 75 NRC at \_\_\_ n.219 (slip op. at 41 n.219)).

Ex. NRC000037, Congressional Budget Office, *The Budget and Economic Outlook: Fiscal Years 2009 to 2019* (Jan. 2009), at 4 (cited in LBP-12-6, 75 NRC at \_\_\_ n.221 (slip op. 41 at n.221)).

Ex. NRC000039, Wessel (May 19, 2009) (cited in LBP-12-6, 75 NRC at \_\_\_ n.223 (slip op. at 42 n.223)).

Ex. NRC000041, *Economist* (June 18, 2009) (cited in LBP-12-6, 75 NRC at \_\_\_ n.224 (slip op. at 42 n.224)).

Ex. NRC000043, Reuters (Sept. 29, 2009) (cited in LBP-12-6, 75 NRC at \_\_\_ n.224 (slip op. at 42 n.224)).

Ex. NRC000044, World Bank Group, at 1 (Oct. 2009) (cited in LBP-12-6, 75 NRC at \_\_\_ n.227 (slip op. at 42-43 n.227)).

<sup>174</sup> See Petition for Review at 10 n.29, citing:

Ex. HNY000025, 2009 Default and Recovery Rates, at 3 (Feb. 2010) (cited in LBP-12-6, 75 NRC at \_\_\_ n.222 (slip op. at 41 n.222) (Finding 51)) (non-public). This exhibit addresses the period from 1920 through December 2009.

Ex. NRC000047, Financial Crisis Inquiry Commission, "Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States" (Jan. 2011), at 353-86 (cited in LBP-12-6, 75 NRC at \_\_\_ n.218 (slip op. at 41 n.218) (Finding 47)). This report addresses the events in the financial crisis from September 2008 to September 2009. Although the report refers to post-2009 events and documents, those references are not relevant to Finding 47, which referred solely to financial developments in 2007.

Ex. NRC000048, Federal Reserve Bank of St. Louis, "The Financial Crisis: A Timeline of Events and Policy Actions" (undated, but providing a chronology of financial developments through April 13, 2011), at 6-9 (cited in LBP-12-6, 75 NRC at \_\_\_ n.219 (slip op. at 41 n.219) (Finding 48)). The four cited pages concern events that occurred solely in 2008.

these eleven exhibits is consistent with our own conclusion, above, regarding the appropriate temporal scope of this proceeding.<sup>175</sup>

**2. *Honeywell's Decision Not to Amend Exemption Request to Include a Later Period***

The Board, in explaining why it did not consider information that was available after 2009, pointed out that Honeywell had chosen not to file the form necessary to expand the scope of its 2009 exemption request (which asked for an exemption only through May 11, 2010).<sup>176</sup> The Board observed that Honeywell had informed the Staff that it intended to submit “a new, updated request for an exemption . . . once the NRC completes its review of the pending request.”<sup>177</sup>

Honeywell asserts that the Board placed too much weight on the fact that Honeywell had not sought “to amend its application for an exemption to specifically incorporate new information or change the dates of the exemption request.”<sup>178</sup> Honeywell acknowledges that it could have either amended its exemption request to revise the dates or filed a new exemption request, but objects that either approach would render its 2009 exemption request moot, thus escaping Commission review.

The court of appeals squarely addressed this argument when it rejected the NRC's mootness argument. The NRC had argued that the period for which Honeywell had sought an exemption had come and gone, and that Honeywell had not kept the issue alive by filing a new request for 2010, effectively abandoning its position. The court of appeals, however, found that

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<sup>175</sup> Even assuming that the Board erred in considering documents published after December 2009, any error was harmless, given the abundant evidence otherwise supporting the Board's findings.

<sup>176</sup> LBP-12-6, 75 NRC at \_\_\_ (slip op. at 19-20).

<sup>177</sup> *Id.* at \_\_\_ (slip op. at 20) (emphasis omitted, ellipsis in original) (citing Ex. HNY000040, Smith, Larry A., Plant Manager, Honeywell, letter to NRC Document Control Desk (Mar. 8, 2011), at unnumbered page 3).

<sup>178</sup> Petition for Review at 11 (citing LBP-12-6, 75 NRC \_\_\_ (slip op. at 19-20)).

Honeywell's claim was *not* moot, and that resolution of the 2009 application would have "a *reasonable chance* of affecting the parties' future relations."<sup>179</sup> Hence, Honeywell could have applied for a post-2009 exemption without mooting its 2009 application.<sup>180</sup>

As the Board correctly held, we did not delegate authority to the Board to issue a new exemption, particularly where a request was not made to the Staff in the first instance.<sup>181</sup> We see no error in the Board's refusal to grant an exemption request for the post-May 2010 period that Honeywell never requested and that the Board was powerless to grant.

### **3. Criteria of Section 40.14**

Honeywell challenges a number of the factual findings underlying the Board's legal ruling that Honeywell had failed to satisfy the criteria in section 40.14, but Honeywell has not challenged the legal ruling itself.<sup>182</sup> On appeal, Honeywell refers to this ruling only once, and even then only summarily.<sup>183</sup>

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<sup>179</sup> *Honeywell*, 628 F.3d at 577 (emphasis in original).

<sup>180</sup> Moreover, the court acknowledged the Staff's annual review process under Part 30, Appendix C. *Id.* at 580 ("The Commission's approvals, and the accompanying reports, gave fair warning that the appropriateness of the time-limited exemption would be reevaluated each year. Indeed, in granting the original one-year exemption resulting in License Condition 27, the Commission advised Honeywell that the exemption 'will expire' and that Honeywell's options upon expiration would be to *re-apply for an exemption*, comply with the self-guarantee financial test without including the value of its goodwill, or have an alternative surety in place.") (emphasis added).

<sup>181</sup> LBP-12-6, 75 NRC at \_\_\_ (slip op. at 20) ("the Commission has delegated to the Board authority to adjudicate the issues raised by Honeywell's hearing request, [but] has not empowered the Board to serve as an initial reviewer of exemption requests") (footnotes omitted). *Cf.* *Honeywell International Inc.; Establishment of Atomic Safety and Licensing Board*, 76 Fed. Reg. 41,312 (July 13, 2011) (the Board "is being established to preside over . . . [t]his proceeding . . . [which] involves a Request for Hearing . . . challeng[ing] the NRC Staff's decision . . . [to] den[y] Honeywell's request for a license amendment authorizing use of an alternative method for demonstrating decommissioning funding assurance").

<sup>182</sup> See Petition for Review at 2-12, 12-24; LBP-12-6, 75 NRC at \_\_\_ (slip op. at 51).

<sup>183</sup> Petition for Review at 12-13 & n.39.

In Part III.A, above, we thoroughly review the Board's findings of fact, and conclude that the Board did not commit clear error in its conclusion that Honeywell did not satisfy the criteria of section 40.14. We therefore agree with the Board that those findings support the Staff's determination that Honeywell's exemption request could endanger life or property and would not be in the public interest.<sup>184</sup>

#### **4. Other Matters**

##### *(a) Reliance upon Proposed or Final Decommissioning Planning Rule*

The record of this proceeding reflects some confusion about whether—or how—the Staff took into account the then-ongoing decommissioning planning rulemaking. We observe that Honeywell, in its 2009 exemption request, asserted that its proposed one-year extension of the existing exemption would be “entirely consistent” with the proposed decommissioning planning rule,<sup>185</sup> and that the Staff, in its Exemption Denial, rejected this argument.<sup>186</sup> We read the Staff's reference to the proposed rule in that context as no more than a response to Honeywell's inaccurate assertion that its exemption request was fully compatible with the proposed rule; we do not read the reference as constituting an independent or additional basis for denying the 2009 exemption request. Indeed, the Staff twice acknowledged that the proposed rule was still pending adoption as a final rule.<sup>187</sup> As the D.C. Circuit ruled, a proposed rule, by its very nature, cannot impose regulatory criteria upon licensees.<sup>188</sup>

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<sup>184</sup> As noted above, we need not and do not address Honeywell's challenge to the Board's imposition of “special circumstances” criteria to the exemption request.

<sup>185</sup> Ex. HNY000006, 2009 Extension Request, at 2.

<sup>186</sup> Ex. HNY000011, Exemption Denial, at 2-3.

<sup>187</sup> *Id.* at 2-3 (“The proposed . . . rule [is] . . . still pending before the Commission”), 3 (concluding that Honeywell had satisfied “neither the current 10 CFR Part 30, Appendix C, requirements, nor the proposed requirements . . . pending before the Commission”).

<sup>188</sup> *Honeywell*, 628 F.3d at 581. To the extent Honeywell argues that its rationale for the requested exemption satisfies the spirit, if not the letter, of the revised decommissioning (continued . . . )

(b) *Collateral Attack on Existing Decommissioning Funding Rule*

As we have stated, we are satisfied that the Board's factfinding underlying its application of section 40.14 criteria is well supported by the record and without discernible error.

Underlying Honeywell's appeal, however, is not only the question whether it has satisfied the requirements for an exemption, but also Honeywell's dissatisfaction with the decommissioning funding rule itself. In addition to presenting a rationale for exempting it from the financial test of Part 30, Appendix C, Honeywell attacks its justification. At bottom, Honeywell contends that "[o]verall, we do not believe that a minimum tangible net worth criteria is useful or relevant."<sup>189</sup>

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planning rule, we need not reach that issue. Cf. Petition for Review at 25 ("Honeywell . . . requests that the Commission grant an exemption to Honeywell permitting it to use the alternate financial test until the effective date of the decommissioning planning rule, which is December 17, 2012"). The rule did not take effect until December 2012 and is therefore inapplicable to this proceeding. See NRC000015, Final Rule, Decommissioning Planning, 76 Fed. Reg. at 35,512. Moreover, following remand, the Staff did not rely upon the provisions of either the proposed or final rule. See Ex. NRC000001, NRC Direct Testimony, at 25-26:

Q.55. Did you use the criteria in the proposed rule to reject Honeywell's exemption request?

A.55. (R. Przygodzki) No. We mentioned the proposed rule in our December 2009 and April 2011 decisions because Honeywell cited the proposed rule in support of its exemption request. If Honeywell had not relied on the proposed rule, there would have been no need for us to address it. However, because Honeywell claimed its request was consistent with the rule or with the intent of the rule, the Staff responded to those claims.

Finally, the Board referred to the proposed and final rules only in a general discussion of Commission policy rather than applicable law. LBP-12-6, 75 NRC at \_\_\_ (slip op. at 18-19) (regarding "special circumstances" under 10 C.F.R. § 50.12).

<sup>189</sup> Ex. HNY000001, Honeywell Direct Testimony, at 29. This was not an isolated comment. Throughout the proceeding, Honeywell set out to prove that "[a] minimum tangible net worth test bears no relation to the overall financial condition of Honeywell" (Tr. 42 (Tus)); that the underlying proposed rule contained "no recent analysis to support the use of a minimum tangible net worth" (Ex. HNY000001, Honeywell Direct Testimony, at 43); and that "[a] minimum net worth test [i.e., one not limited to *tangible* net worth] makes more sense and would better reflect the strength of a company's ability to provide decommissioning financial assurance" (Ex. HNY000001, Honeywell Direct Testimony, at 45). See also *Honeywell's Written Statement of Initial Position* (Oct. 14, 2011) at 40 ("the minimum tangible net worth criterion is not particularly meaningful, at least as applied to large diversified companies such as Honeywell"), 45 ("A negative tangible net worth is not correlated with poor financial performance").

We have repeatedly stated—and our hearing rules explicitly provide—that our adjudications are not the proper arena for challenges to our regulations.<sup>190</sup>

Under the APA, changes to our regulatory regime must result from a deliberative rulemaking proceeding that provides the public with both notice of the proposed regulation and the opportunity to comment. Otherwise, our agency necessarily would address, on a case-by-case basis, “the inevitable multitude of requests for individual exemptions”—with the resulting diversion of “resources that [would be] better allocated to the agency’s primary mission of ensuring that licensees comply with safety and environmental standards.”<sup>191</sup>

Here, Honeywell took full advantage of our recent decommissioning rulemaking and, through the comment process, sought to amend our regulations in a way that, at least prospectively, would have provided it the same relief it otherwise has sought in this adjudication.<sup>192</sup> Honeywell’s rulemaking comments mirror its hearing testimony challenging the usefulness of our tangible net worth requirements.

Honeywell’s arguments in this vein before the Board amounted to a challenge to the tangible net worth requirement. As the Board observed, we already considered those arguments, “either explicitly or by necessary implication, in the rulemaking proceeding leading to the [currently effective] rule sought to be waived.”<sup>193</sup> If, as we discussed above, a licensee objects to the philosophy of an NRC rule—here, the tangible net worth requirement—the remedy is a petition to change the rule, not a series of exemption requests.

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<sup>190</sup> 10 C.F.R. § 2.335(a); *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-6, 75 NRC \_\_, \_\_ (Mar. 8, 2012) (slip op. at 3 & nn.10-11); *Entergy Nuclear Vermont Yankee LLC* (Vermont Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13, 17-18 (2007).

<sup>191</sup> LBP-12-6, 75 NRC at \_\_ (slip op. at 18).

<sup>192</sup> See Tillman, Mitch, Honeywell, letter to Secretary, U.S. Nuclear Regulatory Commission (May 8, 2008) (ML081340194).

<sup>193</sup> LBP-12-6, 75 NRC at \_\_ (slip op. at 50).

(c) *Consistency of the 2007, 2008 and 2009 Exemption Decisions*

As discussed above, the court of appeals found the Staff's decision to deny Honeywell's 2009 exemption request inconsistent with the Staff's 2007 and 2008 decisions granting Honeywell's similar exemption requests for those years, and that the Staff offered an inadequate explanation of its 2009 decision.<sup>194</sup> Although the merits of the 2007 and 2008 exemptions were not the subject of Commission review and are not before us now,<sup>195</sup> we observe that on remand before the Board, the Staff offered substantial testimony explaining and distinguishing its decisions in 2007 and 2008, from 2009.

For example, the Staff highlighted the change in its view of bond ratings.<sup>196</sup> By 2009, the global financial crisis caused the Staff to view bond ratings differently than in 2007 and 2008, particularly because action by the rating agencies tended to be slow—the agency might not downgrade until a company experienced serious difficulties, or might be slow to downgrade due to the adverse impact a downgrade might have on the company.<sup>197</sup> Honeywell disagreed with the Staff's approach to bond ratings, arguing that they have been demonstrated to be reliable over long periods of time, and investment grade issuers such as Honeywell “generally possess

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<sup>194</sup> 628 F.3d at 580.

<sup>195</sup> Inasmuch as the Staff granted rather than Honeywell exemptions in 2007 and 2008, we did not review the Staff's action. As a general matter, certain licensing responsibilities, including exemption requests, for facilities such as the Metropolis facility are delegated to the office “division” level.” See “Office of Nuclear Material Safety and Safeguards Delegation of Authority” (May 2008), at 8 (ML081330671).

<sup>196</sup> Ex. NRC000001, NRC Direct Testimony, at 9 (A.20) (Przygodzki). See *id.* at 9-11 (A.21 through A.24) (Przygodzki).

<sup>197</sup> *Id.* at 11-12 (A.25) (Przygodzki). Regarding the 2008 exemption, the Staff observed that, while the global financial crisis was at hand at the time the exemption was granted, soon thereafter, the economy “experienced another sharp downward turn.” *Id.* at 12-13 (A.26) (Przygodzki, Kline).

sufficient financial strength to weather a recession.”<sup>198</sup> The Staff noted that its assessment of bond ratings constituted only part of its review and explained its consideration of bond ratings in the context of decommissioning funding: while bond ratings serve as a general indicator of a licensee’s ability to pay specific debts over the long term, the tangible net worth requirement is in place to provide assurance that a licensee will be able to provide decommissioning funding in the near term.<sup>199</sup>

The Staff also discussed Honeywell’s tangible net worth at the time of each exemption request.<sup>200</sup> In retrospect, given the decline in Honeywell’s tangible net worth from 2007 to 2008, the justification for the Staff’s decision to grant the 2008 request was not obvious, and the Staff characterized the 2008 approval as “a much closer call” than the 2007 decision.<sup>201</sup> Comparing the 2008 and 2009 exemption requests, the Staff emphasized the significant decrease in Honeywell’s tangible net worth (negative \$1.451 billion versus negative \$5.265 billion, resulting in Honeywell’s need to rely considerably more on goodwill to meet the 10:1 test). Honeywell argued that allowing it to use goodwill to meet the Appendix C test in question provided

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<sup>198</sup> Ex. HNY000001, Honeywell Direct Testimony, at 37 (A.48) (Den Uyl). See Ex. HNY000059, Honeywell Rebuttal Testimony, at 3-7 (A.7 through A.12 (Den Uyl), 14-15 (A.22) (Tus, Den Uyl)). But as the Staff indicated, it did not focus on Honeywell’s financial condition generally, but rather on its ability to fund decommissioning promptly. See, e.g., Ex. NRC000053, NRC Reply Testimony, at 3-4 (A.4) (Przygodzki, Kline), 5 (A.7) (Przygodzki, Kline, Fredrichs), 5-6 (A.9) (Przygodzki, Fredrichs), 7-8 (A.11) (Przygodzki, Kline), 8 (A.12) (Bailey, Przygodzki), 8-9 (A.13) (Przygodzki, Bailey), 9 (A.14) (Bailey, Przygodzki, Kline), 9-10 (A.15) (Bailey, Przygodzki, Fredrichs), 10-11 (A.16) (Przygodzki, Bailey), 11-12 (A.17) (Przygodzki, Bailey), 12-13 (A.18) (Przygodzki, Kline), 13 (A.19) (Przygodzki, Kline, Fredrichs), 13 (A.20) (Bailey), 14 (A.21) (Przygodzki, Bailey), 14 (A.22) (Przygodzki, Kline), 14-15 (A.23) (Przygodzki, Kline, Bailey), 15 (A.25) (Przygodzki, Kline).

<sup>199</sup> See Ex. NRC000053, NRC Reply Testimony, at 10 (A.16) (Bailey, Przygodzki, Fredrichs).

<sup>200</sup> See, e.g., LBP-12-16, 75 NRC at \_\_\_ (slip op. at 29-30).

<sup>201</sup> Ex. NRC000001, NRC Direct Testimony, at 7 (A.14) (Kline); Ex. HNY000012, Kinneman Letter, Enclosure, “Staff Evaluation for Denial of Exemption Request from Title 10 of the *Code of Federal Regulations* Part 30, Appendix C, Regarding Decommissioning Financial Assurance Requirements,” at 3.

adequate assurance “that timely decommissioning can be carried out following shutdown.”<sup>202</sup>

As discussed in greater detail above, the Staff explained that funding must be available when needed—which may be in advance of a planned shutdown.<sup>203</sup> To convert goodwill into cash, “a company like Honeywell would have to negotiate for the sale of an entire business or business line . . . .”<sup>204</sup> In short, extra time may be needed to obtain assets in order to support decommissioning, resulting in the potential for harm to the public from the delay in decommissioning.<sup>205</sup> While this question about goodwill was a concern at the time the Staff granted the 2007 and 2008 exemptions, the Staff stated that the concern was not “at the same level” as it had become in 2009;<sup>206</sup> “the decline was accelerating.”<sup>207</sup>

Finally, the *Honeywell* court posed questions as to how the agency considers tangible net worth as a general matter.<sup>208</sup> As the Staff observed, our regulations do not—and need not—contain such a test.<sup>209</sup> As we stated at the outset of this decision, the NRC reviews exemption requests on a case-by-case basis, considering all matters relevant to the particular request. In this case, the Staff, in denying Honeywell’s 2009 exemption request, considered a number of factors, including: the reliability of bond ratings in the economic climate, and the liquidity of

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<sup>202</sup> Ex. HNY000001, Honeywell Direct Testimony, at 24-28 (A.36) (Tus, Den Uyl).

<sup>203</sup> See, e.g., Ex. NRC000053, NRC Reply Testimony, at 19 (A.32) (Przygodzki, Kline, Collier).

<sup>204</sup> Ex. NRC000001, NRC Direct Testimony, at 15-16 (A.34) (Przygodzki).

<sup>205</sup> *Id.* at 16-17 (A.35 through A.37) (Przygodzki, Fredrichs). The Staff’s reply testimony provides additional insight into the actions a company would need to take to convert goodwill into cash. Ex. NRC000053, NRC Reply Testimony, at 18-19 (A.31) (Collier).

<sup>206</sup> Ex. NRC000001, NRC Direct Testimony, at 17 (A.38) (Przygodzki, Kline, Fredrichs).

<sup>207</sup> *Id.*

<sup>208</sup> 628 F.3d at 581 (“[H]ow far must the tangible net worth decline and over what period before goodwill will not be considered adequate? How does a decline in tangible net worth affect the reliability of the “A” bond rating and other assets previously considered, and the high ratio of net worth to decommissioning liability when goodwill is included?”).

<sup>209</sup> Ex. NRC000001, NRC Direct Testimony, at 30-31 (A.64) (Przygodzki).

goodwill, compared to other assets, particularly taking into account Honeywell's financial condition. In responding to the question on remand before the Board, the Staff explained and distinguished its 2007 and 2008 decisions from its 2009 decision.

#### **IV. CONCLUSION**

For the reasons discussed above, we *grant* Honeywell's Petition for Review and, as a result of our review, *affirm* the Board's denial of Honeywell's exemption request.

IT IS SO ORDERED.

For the Commission

**NRC SEAL**

**/RA/**

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland  
this 9<sup>th</sup> day of January, 2013